29 JANUARY 1947

# I N D E X

## INDIVIDUAL MOTIONS TO DISMISS



# I N D E X

## Of

## MOTIONS AND ARGUMENT

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Of

MOTIONS AND ARGUMENT

(cont'd)

Wednesday, 29 January 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment, at 0930.

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Appearances:

For the Tribunal, same as before with the exception of: HONORABLE JUSTICE NORTHCROFT, Member from New Zealand, not sitting.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

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The Accused:

All present except OKAWA, Shumei, who is represented by his counsel.

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(English to Japanese and Japanese to English interpretation was made by the Language Section, IMTFE.)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now in session.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: I resume the argument on behalf of the defendant TOGO with Japanese - German - Italian relations, page 3 of the printed copy.

The counts charging this defendant in connection with a three-power conspiracy are presumably these:

Count 4, charging that all the defendants conspired that Japan should, in concert with other nations, wage wars in pursuance of a plan for domination of East Asia;

Count 5, charging that all the defendants, with others, conspired that Japan, Germany and Italy should secure domination of the world.

Turning to the evidence, we find ourselves concerned with the Anti-Comintern Pact and the Tri-Partite Alliance, and with the question of economic collaboration between Japan and Germany. First considering the Anti-Comintern Pact, we find from exhibit 485 that the defendant TOGO was present at the meeting of the Privy Council which considered and approved it. As is shown by the personnel record (Exhibit 127), he was at that time, November 1936,

director of the European-Asiatic Bureau of the Foreign Ministry. What the functions of the Bureau Director in connection with the pact may have been is not disclosed by the exhibit or by other evidence; but the document at all events contains no suggestion that any action was taken or any word spoken on the subject at that time or at any other time by Mr. TOGO. It is doubtless superfluous to state that TOGO, attending the Privy Council meeting as a "commissioner" and not as a Privy Councillor or a Minister of State, had no vote and no voice in the resulting decisions of the council.

Moreover, the record is lacking in proof that the Anti-Comintern Pact was in any sense an instrument of criminal aggression. The Pact itself (Exhibit 36) shows on its face that it is directed against the spread of communist ideology; and while the secret agreement annexed to the Pact (Exhibit 480) relates to measures to be taken in the event of unprovoked attack or threat of attack by the USSR, it appears by its terms to be wholly defensive in nature. That the Soviet government and the Communist International are separate, discrete entities is a point which need not be labored, since it has always been the Soviet contention; the distinction between anti-

Communism and Russophobia was well recognized and preserved during the late war by the several United Nations, for whom it would certainly be extremely difficult to discover aggression in the mere fact of the execution of the Anti-Comintern Pact. Exhibits 479 and 484, reports of studies of the Anti-Comintern Pact by Privy Council committees, further expound this distinction and elucidate the point. On the other hand, there is nothing in the record to indicate that the secret agreement to the Pact was intended or treated as other than the defensive agreement which it purports to be. Let it finally be noted that in no event could TOGO have conspired, through execution of this pact with Italy, which adhered to it only in November 1937, and then not to the secret agreement (Exhibit 491) -- this after TOGO had ceased to be connected with the European-Asiatic Bureau.

Much was made by the prosecution of the fact that the Anti-Comintern Pact was renewed and adhered to by additional nations on 25 November 1941 (Exhibit 495) at a time when Mr. TOGO was Foreign Minister. Mr. TOGO was, of course, Foreign Minister at the time; but even if we could concede the existence of an individual responsibility for acts of the government, much more would still be needed here to

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convict him of any offense. The Pact, as has been pointed out, is itself innocuous; its renewal represents only the continuation of a policy already determined upon and adopted long before TOGO's entry into the cabinet (the renewal itself had been orally agreed to in effect by MATSUOKA in Berlin -- see the conversations of MATSUOKA with Ribbentrop, Goering and Hitler, Exhibits 577-583); and above all, there is no showing that the secret agreement, which alone might be considered colorable evidence of aggressive intent, was renewed. The evidence actually invites the inference (which is the fact) that the secret agreement was abrogated when the Pact was renewed (see Exhibit 1,182) -- action which shows the opposite of aggressive intent. The Foreign Minister's explanations before the Privy Council committee, as contained in exhibit 1,182, show that he was the vigorous advocate of abrogation of the secret agreement.

At this point it may be well to anticipate the reply, in the effort to clarify a somewhat complex point. It will doubtless be contended that Mr. TOGO's advocacy of abandonment of the secret agreement of the Anti-Comintern Pact is of no significance by reason of the fact that the Tri-Partite Alliance,

concluded in September 1940, had replaced the secret agreement. (The Tri-Partite Alliance, identified as exhibit 43, was apparently not offered in evidence.) TOGO did indeed, in making his explanation to the Privy Council, state that the secret agreement had no further utility because inter alia of the existence of the Alliance. But this does not at all mean -- despite the ambiguity of his language -- that the Alliance had replaced the secret clause as an implement of anti-Soviet policy; for the Alliance specifically, by its Article V, excludes the suggestion of any such purpose:

"Article V: Japan, Germany and Italy shall confirm that the above stated articles of this alliance shall have no effect whatsoever to the present existing political relation between each or any one of the signatories with Soviet Union."

(Exhibit 551 -- explanations given to the Privy Council of the purpose of the Tri-Partite Alliance -- puts it beyond all doubt that the expectation of government, Army and Navy, was that the Alliance would improve Japanese-Soviet relations.) In consequence -- with whatever trivial and unconvincing ring such an argument may fall on our ears -- the only construction which it is possible to put upon these words of Mr. TOGO is

that for reasons unexplained Japan desired that some sort of bond with Germany be kept extant, perhaps to forestall a sense of isolation. It is in this sense only that Foreign Minister TOGO's words can be taken, and in this sense they must be taken. So understanding them, we can reiterate that it was TOGO who, from no apparent motive other than proper ones, led in the expunging of the only obligation which was conceivably anti-Russian.

It should be mentioned that in the course of this same explanation Mr. TOGO also drew the distinction between the Soviet government and the Communist International. This is the more worthy of note in view of the fact that although it occurred at a secret meeting, where considerable bluntness of expression might be expected, there is nothing in TOGO's words to suggest that he considered the Anti-Comintern Pact to be a covert threat to the USSR. In short, with perfect honesty he accepted at its face value the USSR's contention that the Comintern was a separate entity, with which it had no concern.

We are not, of course, directly concerned with the Tri-Partite Alliance, for at the time of its birth Mr. TOGO was Ambassador in Moscow. If there were any real suspicion that he entertained anti-Soviet

sentiments, it would be dispelled by reference to the words of Ambassador (to Berlin) KURUSU in June 1940, to a German official, Knoll (Exhibit 522). At this very time when the Tri-Partite Alliance was forming, KURUSU assured the Germans that he and TOGO were "feverishly working" for "improvement in Japanese-Russian relations," and that "the enemy in the North must be made a friend."

Much evidence in the record shows affirmatively that with the questions of "strengthening" the Anti-Comintern Pact and arranging the Tri-Partite Alliance Mr. TOGO had nothing to do. Throughout his brief term -- twelve months -- as Ambassador in Berlin these questions were being agitated, but without his knowledge or participation or that of the Foreign Ministry. See the KIDO Diary, exhibit 2,262 (Record, page 16,225): "I heard from the Premier that the German Foreign Minister von Ribbentrop made a very important proposal to Ambassador OSHIMA (Ambassador TOGO was ignorant of this fact)." Reference to exhibits 478 and 497, the interrogation of General OSHIMA, makes this clear. OSHIMA -- then military attache, later TOGO's successor as ambassador -- here details the activities of himself and his staff in this matter. He points out that the military attache is not under

the jurisdiction of the ambassador but is responsible only to the Army General Staff, and may even carry on negotiations with the military officials of other nations, looking to the conclusion of pacts or treaties relating to military matters, "without going through the ambassador," which, he says, is what was done in this case. Only upon OSHIMA's appointment as ambassador in succession to TOGO were negotiations concerning alliance between Germany and Japan "opened," and only then did they become the concern of the Foreign Ministry. In passing, it might be pointed out that the personnel record, exhibit 127, is inaccurate (as was called to the Tribunal's attention on 25 September,) in showing TOGO continuing as Ambassador to the USSR after August 1940; thus he was either in Moscow or (if we assume that he quitted his post soon after being relieved) holding no governmental position at the time of the execution of the Tri-Partite Alliance, and obviously he can be charged with no responsibility in connection with it.

In accordance with Article IV of the Tri-Partite Alliance, Mr. TOGO was on 12 February 1942 designated a member of the joint commissions therein provided for (Exhibit 559). His membership was

ex officio and his designation took place a year and a half after conclusion of the alliance, two months after commencement of the Pacific war. There is no evidence from which it can be inferred that the commission ever met or functioned, and on the record nothing can be predicated of Mr. TOGO's membership in it.

On the question of German-Japanese economic collaboration (with reference especially to trade and commerce in China), a number of documents refer to activities of the defendant TOGO. These need not be discussed individually, but are listed for convenience:--I omit reading the numbers--(Exhibits 591, Record, p. 6,585; 592, Record, p. 6,588; 593, Record, p. 6,591; 594, Record, p. 6,597; 595, Record, p. 6,603; 597, Record, p. 6,627; and 39, Record, p. 6,625). I do not discuss these memoranda of conversations between TOGO and German Foreign Ministry officials because they all show TOGO's stubborn refusal to concede to Germany anything more in the China trade than most-favored nation treatment -- which is not the economic collaboration of conspirators -- and his inflexible opposition to German demands for special economic concessions. I do not discuss this question in detail because the President of the Tribunal, at the time of the reading

of the documents, summed up their significance in the statement that, "it is the sort of material the defense might use to show lack of cooperation between Japan and Germany" (Record, p. 6,621). It unquestionably cuts the ground from beneath the feet of any effort to show TOGO as a conspirator with Germany.

The agreement among Japan, Germany and Italy not to conclude separate peace, entered into after the beginning of the Pacific war (Exhibit 51) is by the very fact of its date no evidence of any warlike designs; once a war has started such agreements are routine among allies. TOGO's direction to his ambassadors to request conclusion of such an agreement, to be prepared for the worst once it appeared to his government that war was most probable, likewise is not probative of sinister intent.

There remains to mention exhibit 486D, a memorandum by von Neurath of a conversation with Ambassador TOGO concerning the China affair. While presumably this is offered to show Japanese-German conspiracy toward China, in fact it shows only that, acting under instructions, the ambassador was stating the policy of his government, which was to try to persuade Germany to use her presumed influence by applying pressure on China to make peace. Ambassador

TOGO's assertion of Japan's determination to gain military victory over China, as reported by von Neurath, is likewise no more than the reflection of the Japanese policy embodied in the KONOE Declaration (Exhibit 972-A) of a few days later, but already known to him (as is obvious inferentially from Exhibit 486-F). It is submitted that consideration of all the evidence offered in this phase conclusively absolves the defendant TOGO of all charges of conspiracy with Germany and Italy.

'Conventional War Crimes

In "Group 3" of the Indictment the defendant TOGO is charged with "conventional war crimes and crimes against humanity"as follows:

Count 53, charging conspiracy to order, authorize and permit certain subordinates to commit breaches of the laws and customs of war, and to abstain from taking adequate steps to secure observance of the conventions relating to prisoners of war;

Count 54, charging the authorizing and permitting of such acts;

Count 55, charging deliberate and reckless disregard of duty to take adequate steps to secure observance of the conventions relating to prisoners of war.

Voluminous evidence, much of it of a peculiarly revolting character, has been introduced to prove the widespread commission by Japanese troops of atrocities against prisoners of war and civilians. The question remains, "Who is guilty?" There is nothing in the record to show that the defendant for whom I am speaking bears any part of this burden of guilt.

It is proved that it was in the name of Foreign Minister TOGO that Japan's assurances concerning application mutatis mutandis of the Geneva Convention

and observance of the Red Cross Convention were given; these communications need not be itemized here. Thereafter the Foreign Ministry received and answered various communications relative to the subject -- giving replies which in instances seem on the evidence of the prosecution to have been false. But there is a vast abundance of evidence touching upon the point to show conclusively that neither the Foreign Ministry nor the Foreign Minister had any responsibility for management or control of prisoners of war, nor any facilities for independent ascertainment of the facts concerning their lot, nor indeed any reason to disbelieve nor power to disprove the replies to inquiries and protests prepared by the military bureau concerned. The witness General TANAKA twice unequivocally stated that the Foreign Ministry, in receiving and transmitting these documents, acted as a mere "post office". In explanation of this, he said that the Prisoners-of-War Information Bureau and Prisoners-of-War Administration Bureau -- which between them had, as he had previously fully explained, the whole control of prisoners of war -- were "both under the jurisdiction of the War Minister"; and that having no organization nor authority for investigating protests, the Foreign Ministry could only "relay the decisions reached at the War Ministry by

the Army". See also on this point the testimony of YAMAZAKI, Shigeru, especially his statements that the responsibility for action taken on protests was with the bureau to whom the protest was forwarded and that the replies were prepared within the War Ministry and sent to the Foreign Ministry. The testimony of the witness SUZUKI Tadakatsu explains the procedure for dealing with these documents within the Foreign Ministry, and clarifies further the point that the Foreign Ministry's only function was receipt and transmittal of papers. This testimony as a whole is of great importance on this point, but I refrain from more than quoting its salient points and urging that reading the entirety of it will render this point quite perspicuous.

The extent of the Foreign Ministry's authority or power in connection with the prisoner-of-war matter, Mr. SUZUKI testified, was the handling of the correspondence -- the incoming protests and inquiries, the outgoing answers. This forwarding was done as expeditiously as possible in every instance, and the War Ministry officials concerned were from time to time requested to hasten the preparation of the replies which the Foreign Ministry was to translate and deliver. The Foreign Ministry had no means of obtaining information concerning prisoners of war except as it was provided by the War Ministry.

Notwithstanding the Foreign Ministry had no further authority in the matter, it did on occasion make recommendations to the War Ministry authorities, request reinvestigations of various matters, and in general do everything possible to ameliorate the condition of prisoners. Although Mr. SUZUKI's bureau was established after Mr. TOGO had left the Foreign Ministry, the practice of the Treaty Bureau, which had managed the business theretofore, was in all respects the same.

During Mr. TOGO's first incumbency of the Foreign Ministry (to 1 September 1942) occurred the notorious "Bataan Death March". It is significant that even the Premier, General TOJO, concurrently Minister of War and as such the superior official of the bureau concerned with prisoners of war, first learned of the Bataan case as late as the end of 1942 or early in 1943 (see his interrogation, exhibit 1,980E) -- after TOGO had quit office. If not even the Minister of War had such information, clearly the Foreign Minister, who had no jurisdiction nor responsibility in the matter, cannot be chargeable with notice.

The case of the working of prisoners on the Burma-Thailand railway patently concerns the Foreign Minister even less; the affidavit of General WAKAMATSU (Exhibit 1,989) is explicit that this action was decided

upon by the Imperial General Headquarters, at the request of the Southern Army, in the summer of 1942. Exhibit 475, a report by the War Ministry, also states that it was the order of Imperial General Headquarters; nowhere is it suggested that the Foreign Ministry, or indeed the government itself, had any knowledge of the plan for using prisoners of war in the work. The actual construction was commenced, according to Exhibit 475, in November 1942, which is some time after Mr. TOGO had left the Foreign Ministry.

If there is no evidence of TOGO's ordering, authorizing or permitting the commission of atrocities, or conspiring thereto, there is equally a failure of proof of his having deliberately, recklessly or otherwise neglected any duty in the matter. So far as the evidence concerning his only duty -- that of dispatching his share of the business of attending to the diplomatic correspondence -- goes, every duty was discharged fully and faithfully. It would do violence to the principles of judicial proof to hold that the prosecution's burden has been sustained against TOGO on these counts.

China, Manchuria and other Asiatic Relations

The defendant TOGO is charged by the Indictment with various offences in connection with China, Manchuria, Indo-China and Thailand, as follows:

Counts 4 and 5, charging conspiracy to wage war against France and Thailand, inter alia;

Counts 6, 15 and 16, charging the planning and preparation of war against China, France and Thailand, respectively;

Count 24, charging the initiation of war against Thailand;

Counts 27, 28 and 34, charging the waging of war against China and Thailand respectively.

This part of the case can be rather summarily dealt with in view of the complete absence of evidence to connect this defendant with those matters.

Prior to Mr. TOGO's assumption of the Foreign portfolio he had had no connection with China, Manchoukuo or other Asiatic affairs. In this connection it should be pointed out that although he was, from June 1934 to October 1937, Director of the Foreign Ministry's European-Asiatic Bureau, that Bureau had no connection with the matters here in question. The record of the opening statement on the subject of Foreign Ministry organization is patently garbled, for it states that the duties of this Bureau "pertain only to America"; if I may venture to go outside the record to state the fact, the "Asiatic"affairs of concern to this bureau are those other than Chinese and Manchurian.

During the short period of time from his installation as Foreign Minister until the outbreak of the Pacific War, TOGO was obviously absorbed with the Japanese-American negotiations, and quite naturally is not shown to have had any concern with Asiatic affairs. With the decision for commencement of the war, of course he requested for his government the cooperation of the governments of Manchoukuo (Exhibit 1,214) and Nanking, China (Exhibit 1,219), but with war once decided upon this is only a formal matter.

As to Indo-China, there were no such diplomatic measures as would concern the Foreign Minister at the time of the opening of the war. The conclusion of the military agreement (referred to by the prosecution -- Record, p. 6,724 -- but not in evidence). Other measures vis-a-vis Indo-China which occurred in the interim between his two periods as Foreign Minister (October 1941-September 1942, April-August 1945) likewise do not concern him -- especially as they show that by the end of that period military and not diplomatic relationships concerned that country.

THE PRESIDENT: After the words in parentheses in the middle of the paragraph you omitted to read "was of course not within the province of the Foreign Ministry".

MR. BLAKENEY: Yes, I am sorry.

THE PRESIDENT: But it will appear in the transcript, no doubt.

MR. BLAKENEY: Thank you, sir.

Perhaps the most significant evidence concerning TOGO's attitude toward other Asiatic countries is to be found in the Foreign Minister's speech before the Diet on 22 January 1942 (Exhibit 1,338A). This speech calls for close cooperation of Eastern Asiatic nations, in that respect being a routine piece of war-time propaganda. But it also clearly shows throughout that Japan entertained no aggressive intentions toward those nations, and that Mr. TOGO insisted upon the necessity of observing the rights and dignity of all Asiatic peoples. Parenthetically, it also reiterated the necessity of maintaining the Neutrality Pact with the U.S.S.R. TOGO's true attitude toward the nations and peoples of Asia is most clearly evident in his vehement opposition to the creation of the Greater East Asia Ministry in 1942, which led to his resignation of his office in September of that year. See the KIDO Diary (Exhibit 1,273); minutes of the Privy Council (Exhibit 687): as well as the opening statement of this phase, explaining the Greater East Asia Ministry.

As is set forth in argument of the general motion to dismiss, there is no sufficient evidence

proving or tending to prove aggression against Thailand; hence we need not consider whether any connection of Mr. TOGO individually is shown.

The complete dearth of proof against the defendant TOGO in connection with the counts under this head requires that they be dismissed as against him.

Japanese-American Relations.

The counts charging the defendant TOGO in connection with relations and hostilities between Japan and the United States are:

Counts 1, 4 and 5 charging conspiracy to dominate the Pacific or the world, and in effectuation thereof to wage war against the United States;

Counts 7, 20 and 29, charging respectively the planning, initiating and waging of war against the United States;

Counts 13, 21 and 30, charging respectively the planning, initiating and waging of war against the Commonwealth of the Philippines (a possession of the United States).

Since Mr. TOGO is not a military man, we may say that the charge of his having waged war against enemy nations is sustained by no proof unless it be the contention that all members of the government of a nation at war are "waging" war -- a question to be argued elsewhere. We shall therefore consider here the questions of conspiracy to wage war and the planning and initiating of war.

Mr. TOGO's motives in entering the TOJO ministry upon its formation in October 1941 have been clearly stated by a prosecution witness. The TOJO

government has been widely advertised as a war cabinet ab initio, but the evidence fails to bear out this interpretation: rather it shows that TOJO was enjoined by the Emperor upon his appointment, and was expected by those concerned, to make further efforts for a peaceful settlement with America, even so late, when Japan was already upon the brink of war (KIDO Diary, exhibit 1,154). It was upon this understanding that TOGO entered the cabinet as Foreign Minister. The witness SUZUKI Tomin testified that TOGO told him, in a conversation soon after formation of the TOJO government, that he had accepted office solely upon Premier TOJO's assurance that his policy would be to work for peace, and because on the basis of that assurance he believed that he would be able to bring about a peaceful settlement. This fitted in with the belief which SUZUKI explained that he held, that TOGO had always been an exponent of peace. That the prosecution witness TANAKA Ryukichi also considered TOGO to be a leader of pacific and non-militaristic sentiment is interestingly revealed by his testimony that he approached TOGO in 1942 and urged him to start a political movement to oust TOJO, of whose war policies TANAKA seems to have

disapproved.

Throughout the diplomatic correspondence between the Foreign Ministry and the Embassy in Washington, as it is exhibited in the evidence, are many indications of Mr. TOGO's efforts to conclude the Japanese-American negotiations successfully. From the mass of such evidence, we may select a few points for mention. (Exhibits 1,163 and 1,164). The new Foreign Minister's instructions to the Ambassador at the beginning of his connection with the negotiations contain a clear statement of his policy of making the utmost possible concessions in a spirit of friendship and conciliation. Ambassador KURUSU was specially sent to Washington to contribute to the success of the negotiations (Exhibit 1,166). TOGO invited Great Britain to take part in the negotiations, in order that all interested parties might be available to ensure a complete settlement (Exhibit 1,174). He made numerous concessions to the opposing demands in the course of the negotiations, in an apparent effort to bring them to fruition. (Exhibits 1,165 and others).

On the other hand, all the evidence clearly shows that the final outbreak of war between Japan and Britain and America was in spite of, certainly

not because of, TOGO's efforts. It is quite clear from the record that long before Mr. TOGO took office in October the situation was so tense that there was the ever-present, explosive possibility of war. The decision of the Imperial Conference of 2 July (Exhibit 558) was a grave one which, as was conceded by the prosecution, had a direct bearing upon the ultimate result, war; that of the 6 September Conference (Exhibit 588) even included preparations for either eventuality, of war or peace, so dubious were the prospects. That, in short, the possibility of war at any time was recognized on both sides of the Pacific is plain from this evidence as well as from numerous references -- which I do not pause to collect here -- scattered through the testimony of the witness Ballantine.

In these circumstances, what could a newly-appointed Foreign Minister do to avert war except carry on negotiations with the consciousness that if they ended in failure there could be no peace? Limited as he was by the decisions already taken, as well as by those of the subsequent Liaison Conferences which he himself attended -- but in which, as a matter of course, the newer members (those, in other words, who had not participated

in the September Imperial Conference decision) were relatively uninfluential -- he could do no more than strive, as the prosecution's own evidence shows that he strove, for a satisfactory formula, and in the end accept the result which was not of his doing, but preordained (compare Ambassador Grew's opinion that Japan would be driven to war by such economic measures as the July freezing of assets. If, when the end came, he voted for the inevitable war, shall we then label him a warmonger?

There is the charge that Japan perfidiously professed to be still negotiating in good faith for peace, the while she prepared and launched her war. Since the intention of this charge is to incriminate the Foreign Minister, let us examine it to determine what factual basis it has. The decision for war was made at the Imperial Conference of 1 December (Exhibit 588). Until that decision had actually been taken -- by the only body competent to take it -- the Foreign Minister was still working for a solution, as is evidenced by his instructions to his Ambassador to attempt to obtain reconsideration by the United States (Exhibit 1,194). Quite naturally, he continued striving, even thereafter, so long as there was any faintest hope --

just as did Secretary of State Hull on his side. And although in late November the fleet had been given its orders, in case worst should come to worst (no evidence shows knowledge by the Foreign Ministry of this), yet on the 21st and even on 2 December -- significant date, the day following the decision for war! -- the Commander-in-Chief of the Combined Fleet was given instructions by the Naval General Staff for its recall and for the cancellation of the war-plans in the event of a successful conclusion of diplomatic negotiations (Exhibit 809). Is this the scheming of perfidy? Rather, it is submitted, the effect of this evidence in sum is to show TOGO earnestly endeavoring to save the situation in the face of hopeless odds, and not to raise even the suspicion of insincerity or duplicity.

One or two subsidiary questions may be put into proper perspective. Much was made of the delay in delivery of the message (which "might have changed the course of history") from President Roosevelt to the Emperor. Aside from the question of the probable effect on the course of history, question not really of any difficulty in view of Mr. Ballantine's testimony, there is no evidence

to connect the Foreign Ministry with the deliberate delaying of the communication. The statement by the prosecution that the contents of the message were known in "Japanese Government offices" by 6 P. M. of 7 December is supported by no scintilla of evidence that it was so known to the Foreign Ministry; but the testimony of the witness SHIRIO is specific that the orders which brought about the delay in delivery to Ambassador Grew until 10:30 P. M. were those of the General Staff. No knowledge of this arrangement by the Foreign Ministry is shown.

On the question of the delivery of the final Japanese note in Washington after the commencement of hostilities, the evidence is clear that this was contrary to the direct order of the Foreign Ministry. (Exhibits 1,216 and 1,218). TOGO's instructions to NOMURA to make all necessary preparations without fail and to deliver the note at 1 P. M., leave no doubt of the intention of the Foreign Minister; whatever the reason for the delay in delivery until 2:20, it has not been traced to him.

It should be added that, not alone under this branch of the argument but in relation to the

motion as a whole, other points of greater or lesser concern to this defendant will be presented in argument of the general motion. To the argument of that motion reference is made to the extent that it is applicable. Other minor points might be adverted to, but at the risk of tedium. Suffice it to say that in my judgment the evidence introduced in the Pacific War phase not only does not convict TOGO of any deviousness or disingenuity, but on the contrary affirmatively shows him as a sincere worker for the preservation of a peace which, tragically, could not be preserved.

It is respectfully submitted that the analysis of the record offered above, taken in conjunction with that contained in the general motion to dismiss, leads to the conclusion that prima facie proof of none of the offenses charged against the defendant TOGO has been made, and that the indictment should be dismissed as against him.

THE PRESIDENT: Mr. Blewett.

MR. BLEWETT: If the Court please:

Now comes the defendant, TOJO, Hideki, by his counsel of record, and moves the Honorable, the International Military Tribunal for the Far East, to dismiss all the charges and counts against

him in the Indictment upon the grounds that all the evidence offered by the prosecution is not sufficient to warrant the conviction of this defendant.

The prosecution in its opening statement offered to show by competent legal evidence that every attack made by Japan from 18 September 1931 on Mukden down to Pearl Harbor, Manila, Davao, and Hongkong on the 7th and 8th of December 1941 and others were illegal acts, and that everyone of the accused named in the Indictment played a part in these unlawful proceedings, and that they acted with full knowledge of Japan's treaty obligations and of the fact that their acts were criminal.

It also represented that it would prove by competent legal evidence that these accused by virtue of their positions in the Japanese Government conspired to and planned, prepared, initiated and waged illegal wars, and that each accused was personally liable for acts alleged to be criminal.

The prosecution also asserted it would set out to prove that only positive orders from those accused made possible crimes against humanity. The crux of the prosecution case, and the objective of its evidence, are charges that the

accused participated in the formulation and execution of a common plan or conspiracy to wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances against any country or countries which might oppose them, with the object of securing military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and all countries bordering thereon and islands therein and ultimately the domination of the world.

To prove that charge it was prepared to prove the fact of a conspiracy, and that these defendants were parties to it, which burden it assumed.

I. Among other charges, in order to prove the facts of a conspiracy and the participation of this defendant therein evidence was introduced to prove that in the public school system of Japan a program was introduced to build up a military spirit and to cultivate a concept that the future progress of Japan depended upon wars of conquest.

It is submitted that the evidence presented in no manner proves the existence of a

conspiracy for any such purpose or that this defendant was in any way involved in such a program.

II. A vast amount of evidence was presented concerning the occupation and development of China and Manchuria by the Japanese ard the prosecution attempted here, as was its burden, to prove that the entire movement extending over several years was the direct purpose of a conspiracy lead and controlled by those accused.

It is submitted that the proof offered is insufficient to show the existence of such a conspiracy, and no positive legal evidence was offered to prove that this defendant participated as a leader, organizer, instigator or accomplice in any such plan.

III. Evidence was offered by the prosecution in attempting to prove as alleged in the Indictment, that all the defendants acting in a concerted, specifically directed conspiracy entered into an agreement with Germany and Italy to dominate the world.

It is submitted to the Tribunal that there is no conclusive evidence in the record to support this allegation, nor any legal competent evidence to prove that this defendant is criminally responsible for any such enterprise.

IV. It is submitted that the prosecution has not presented evidence sufficient to prove that all the defendants, acting in concert, conspired to plan, prepare and wage a war of aggression and a war in violation of international law, treaties, agreements and assurances against China, United States of America, United Kingdom of Great Britain and North Ireland, Australia, New Zealand, Canada, India, Philippines, Netherlands, France, Thailand and Soviet Russia.

It is submitted that there is no legal competent evidence in the record to prove that this defendant alone or acting with others initiated or waged a war or wars of aggression against the

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aforementioned nations, including the Mongolian People's Republic.

V. As was readily accepted by the prosecution, in order to convict these defendants for murder it was incumbent upon it to prove that the waging of war was the direct result of a conspiracy to wage wars of aggression, with the object ultimately of world domination. To prove that all deaths connected with hostilities constituted crimes of murder it was necessary to prove that all these wars were illegal, and to prove, further, that as to this defendant he was individually criminally responsible.

It is represented that the prosecution has failed to prove by competent evidence that the war or wars enumerated in the Indictment constitute so-called "wars of aggression," waged as the objective of a powerful conspiracy, and therefore they cannot be classed as illegal wars as charged. As a natural consequence, therefore, there is no proof capable of supporting the allegations of murder and conspiracy to murder.

It is suggested that the prosecution's witnesses and documents conclusively indicate that the Japanese Government and these defendants initiated the proposal to the complaining nations in this

Indictment for a peaceful solution of all problems in the Pacific area.

VI. With regard to the final charges in the Indictment concerning Conventional War Crimes and Crimes Against Humanity, the prosecution undertook the burden of showing that only positive orders from these accused made possible these alleged crimes.

It is submitted that nowhere in the record of these proceedings has the prosecution offered any competent legal evidence to prove that the defendant, TOJO, as Premier or War Minister issued a single positive order to any Field Commander or to any Prisoner of War Camp Commander to commit or permit any act or acts averred in Counts 53-55 inclusive of the Indictment.

If I may be privileged, your Honor, to make one further comment, which has been translated.

The Chief Prosecutor and his extremely able and conscientious staff, consisting of fine jurists and lawyers from many nations, have performed a tremendous task with credit.

That they have failed to make out a case against the accused is not due in any way to their lack of integrity or resourcefulness. No prosecution in all history, nor all the great prosecutors of all

time, combined here in this court of justice, could, with the material at hand, prove those defendants guilty of the acts alleged to be crimes under this Indictment. Under existing law it is humanly impossible to do so.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: Motion to dismiss of UMEZU, Yoshijiro.

Now comes the defendant UMEZU, Yoshijiro, and moves the Tribunal to dismiss the Indictment and the several counts thereof insofar as they relate to him,upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the Indictment.

For the convenience of the Tribunal, the argument of this motion will be presented under a few general heads, with reference in each instance to the specific counts of the Indictment concerned.

I must ask the Tribunal's indulgence for making a few slight additions to the printed copy.

China Questions.

The counts of the Indictment charging this defendant with offenses toward the Republic of China are:

Count 2, charging conspiracy to dominate

Manchuria through the waging of war of aggression.

Count 3, charging conspiracy to dominate China through the waging of war of aggression.

Count 6, charging the planning and preparing of war of aggression against China.

Counts 18 and 19, charging the initiation of war against China in September 1931 and July 1937 respectively.

Counts 45, 46, 47, 48, 49 and 50, charging murder in connection with the taking of Nanking in December 1937; Canton in October 1938; Hankow in October 1938; Changsha in June 1944; Hengyang in August 1944, and Kweilin and Liuchow in November 1944.

First, considering the Manchuria Incident, we find that General UMEZU had at the time of the Incident been Chief of the General Affairs Department of the General Staff Office (concerned with personnel, organization and mobilization -- Record p. 589) for just some six weeks (Cabinet Secretariat personnel record, exhibit 129, Record p. 803). Of the numerous witnesses who testified in extenso to the details of the planning and execution of the Manchuria Incident, not one breathed the name of UMEZU; there is not a suspicion in the record that he had even any knowledge of, far less any part in,

this Incident. Counts 2, 18 and 27, therefore, are sustained by no evidence against this defendant.

From March 1934 to August 1935 General UMEZU was in China, as Commander-in-Chief of the North China Garrison in Tientsin (exhibit 129). During this time there came into being the "HO-UMEZU Agreement," of which so much has been made in the attempt to establish it as a casus belli and the fount and source of the autonomy movement in North China. The attempt falls very flat. Upon investigation, the "agreement" proves to be no more than a military understanding, based upon established treaty rights, made between military commanders in the always troubled arena of North China. So much is conceded by one of the chief witnesses on the subject, TANAKA, Ryukichi (Record pp. 2,144-52). TANAKA says that General UMEZU's purpose in making this agreement was clearly the legal one of implementing the Boxer Protocol, under which the North China Garrison had the right and the duty of protecting Japanese nationals and communications, by suppressing anti-Japanese actions in North China; that the intention of the agreement was to establish an atmosphere of peace and quiet; and that "it is a fact that as a result of the HO-UMEZU Agreement

the assassination of pro-Japanese Chinese, as well as inflammatory editorials against Japan in Chinese papers, disappeared" (Record pp. 2,145-46).

If the object was lawful, what of the means employed? Most of the evidence bearing on the terms and circumstances of the agreement is to be found in the testimony of the witness Goette (Record pp. 3,746-50, 3,805-12). This testimony is, to say the least of it, unsatisfactory. The witness says that the agreement was "enacted" on 9 June 1935, but he does not know whether it was written or oral, and in fact confesses that he knows none of its terms (Record p. 3,806), but only "What was carried out thereafter" (Record p. 3,748). By this post hoc ergo propter hoc reasoning we learn that certain Chinese troops were withdrawn from the area; that the political offices which had contributed to the strained Sino-Japanese relations were closed; that some Chinese commanders were recalled. But not even the witness himself is entirely convinced by his reasoning; he can't say, for example, whether the removal of the Hopei provincial capital was one of the terms of the agreement, even though the removal followed (Record p. 3,805). Although some Chinese, who remain anonymous, told him that the agreement was

forced upon them by the threat of military occupation (Record p. 3,811-12), ewen after the withdrawal of their 51st Army they still outnumbered the Japanese in the Peiping-Tientsin area by at least 25,000 to 10,000 (Record p. 3,807). At the time of the agreement, Ho Ying-chin was "Chinese Minister of War in Peiping" (Record p. 3,746); UMEZU, he "presumes," was "on a special mission" for the Japanese Army (Record p. 3,810).

In this testimony several points stand out. Ho Ying-chin, as is shown by exhibit 210 (Record p. 2,696, from p. 1 of the document, not read into evidence), from Chinese sources, was not Minister of War; he was "Acting Chairman of the Peiping Branch Council of the National Military Council." UMEZU was of course not on a "special mission," and it is almost incredible that a "dean of correspondents," professing to have an expert knowledge of Sino-Japanese affairs of North China, should not know the name of the Commander-in-Chief of the Japanese garrison at such a time of crisis as he alleges this to have been. Mr. Goette is quite sure that the Chinese 32nd Army was withdrawn southward as a "result" of the "HO-UMEZU Agreement" (Record pp. 3,748, 3,809), but is again contradicted by exhibit

194 (Record, at p. 2,276), which shows it to have been the 51st Army which was withdrawn. It is perhaps a fair deduction from all the evidence that the "HO-UMEZU Agreement" never actually existed as such. No one has seen it; its terms cannot be ascertained; and it appears to have been no more than an agreement between military commanders trying to maintain peace in the face of disturbing incidents.

If the "Agreement" did exist, it can scarcely be seriously contended that there has been shown to have been anything sinister in it. The witness TANAKA tried to show that the autonomy movement in North China which followed was grounded upon it, and so it may have been, but that can upon no reasonable construction be imputed to the defendant UMEZU, in view of TANAKA's positive statement of what General UMEZU's motives were during his time as Commander-in-Chief (the first autonomous government was established four months after UMEZU left China -- Record p. 2,147; exhibit 210 -- whence the witness perforce conceds that UMEZU had no responsibility for its establishment. (Record p. 2,151). To what ends those who followed may have perverted his work can be no evidence of waywardness in him. At all events, there was no suspension of Chinese sovereignty as a consequence of

this agreement; the army of Sung Che-yuan, who was the appointee of the central government (Record p. 3,808) remained in occupation of the area. (Record p. 3,749).

Eder & Duda

TANAKA, by the way, points out also that whatever responsibility for the agreement rests upon General UMEZU, it is by virtue solely of his position of command, for the ardent advocate of it, to whose hands General UMEZU confided the entire matter, was his Chief of Staff, Colonel SAKAI. That he should have done so is but natural, since he was a man who "dislikes very much to put his finger into politics," and was "one of our senior officers who has constantly instructed us not to interfere in politics." Thus the much-publicized term "Ho-Umezu Agreement" is a memorial to this defendant's vicarious responsibility for an innocuous settlement which is in large part mythical.

One other incident of the North China days may be mentioned. This is the "North Chahar Incident" of June 1935, testified to by the witness Ching Teh-chun (exhibit 199). The only connection with General UMEZU is that according to this testimony the matter was referred for settlement to the headquarters of the garrison force at Tientsin -- where, however, surprisingly, the whole negotiation was controlled by General DOHIHARA. "Surprisingly," because there is no evidence whatever that DOHIHARA was at that time connected in any way with the North China garrison --

rather, the personnel record (exhibit 104) shows that he was attached to the Kwantung Army. General Ching, in fact, admitted on cross-examination that when he said that the matter was referred to the Japanese headquarters in Tientsin he meant that it was referred to the Japanese headquarters represented by General DOHIHARA; his surmise that DOHIHARA represented both the North China garrison and the Kwantung Army is hardly evidence of the fact. Ching admits that the matter was not taken up in any other way with the North China garrison headquarters.

The commencement of the China Incident in July 1937 found General UMEZU Vice-Minister of War. Since no evidence was proferred to connect him with the hostilities in China, we must assume that it is the contention that his official position establishes his guilt. That the vice-minister has no authority to make important decisions and merely carries out the will of the minister was stated by the witness TANAKA and by the prosecution, and must be self-evident. In no event, of course, had the War Ministry responsibility for operations (testimony of TANAKA). Vice-Minister UMEZU is therefore in no way shown to share any responsibility for the China Incident.

Lastly, in connection with China, UMEZU is

charged with murder as the result of alleged massacres accompanying the taking of a number of cities in China in various years. As to those dating from 1937, the remarks in the preceding paragraph apply -- the vice-minister has no responsibility. As to those in 1938, the personnel record (exhibit 129) shows that from May of that year General UMEZU was commander of the 1st Army, the location of which at the time is shown, by exhibit 2282, record at page 16,259, to have been in North China; by no reasoning, therefore, could he be charged on the record with responsibility for events in South China in October of that year. And as to those occurring in 1944, when he was Chief of the General Staff (from July, however; he was in Manchuria when the massacre at Changsha, in South China, is laid by Count 48), there is again no evidence of any order by him or knowledge in him of those events, and it is submitted that there is no ex officio guilt.

In connection with Manchukuo, there is much evidence intended to prove that it was but a puppet state under Japanese domination. Two considerations occur here. First, there is the question whether from its inception Manchukuo was a mere false front, rigged by the Japanese for the purpose of furthering their aggressive designs; if this was the fact, then

even a commander-in-chief of the Kwantung Army arriving eight years later might be considered a manipulator of the puppets; if it was not, then the position of the commander-in-chief is only that of any military commander carrying out his duties. The chief evidence on this point is that of the witness Pu-Yi. Without taking the time of the Tribunal to analyze it, we may say that cross-examination, together with other surrounding circumstances, shows this testimony to be incredible. The witness repeatedly contradicted himself, evaded direct answers to questions, took refuge in "I can't remember" and "I said it, but under compulsion" and in general made such an impression that even taking his testimony at its face value it is impossible to say that his contentions are borne out by the proof. As to the origin of Manchukuo and his return as a ruler, he is contradicted on the record by the witness Semyonov, who states in his affidavit (exhibit 668) that Pu-Yi suggested to him that he had asked Japanese assistance in restoring him to the throne, and that he himself negotiated with the Japanese on Pu-Yi's behalf. By a curious quirk of procedure, Pu-Yi stands impeached on the record in the matter -- irrelevant in itself, but basically affecting his credibility -- of whether he wrote the letter to

General MINAMI, exhibit 278. Inasmuch as the prosecution offered the questioned document in evidence, it assumed the burden of proof of its non-authenticity. This it undertook to prove by the affidavit of a self-styled expert, Chang (exhibits 2176 and 2189). Unfortunately, this "expert" committed the tactical blunder of going beyond the question involved and passing his judgment that another specimen of handwriting, the Chinese fan (exhibit 282) was not the hand of Pu-Yi. This was a blunder because Pu-Yi himself had identified the fan as being in his own writing ("That was my own writing I copied from the poem"), which entirely destroys the "expert's" qualifications and leaves the burden of proof assumed by the prosecution unsustained. On the record we can say only that Pu-Yi is an incredible witness, whose testimony must be ignored.

Otherwise, there is no evidence to prove any charge against UMEZU of "dominating" Manchoukuo. To take one example of many from the evidence, there was much evidence concerning opium-cultivation in Manchoukuo. But this evidence all tends to show that it was the government, not the Kwantung Army nor its commander-in-chief, which was in control. (Incidentally, the opium charges do not in themselves state crimes even within the purview of the charter; unless some connection with the waging of aggressive war or the domination of Asia is demonstrated, all such evidence is irrelevant to any issue.)

Soviet Relations

The charges in connection with the USSR are:

Count 17, charging the planning and preparing of war against the USSR;

Counts 26 and 36, charging respectively the initiating and the waging of war against the USSR in connection with the Khalkhin-Gol (Nomonhan) incident;

Count 51, charging murder in connection with the Khalkhin-Gol (Nomonhan)

incident.

Nomonhan is readily disposed of. General UMEZU was appointed Commander-in-Chief of the Kwantung Army on the 7th of September 1939 (Exhibit 129). If he arrived at his post in Manchuria on the very day of his appointment, the Nomonhan incident had already been in progress for 4 months (Exhibit 766). The last battle occurred in August and the incident itself ended within the week after UMEZU's appointment. This looks far more like the initiating and waging of peace than of war -- an interpretation borne out by the absence of any evidence tending to connect UMEZU with Nomonhan.

The other Russian question is in connection with General UMEZU's period as Commander-in-Chief of the Kwantung Army. When we embark upon an analysis of the evidence in this phase, we enter the realm of fantasy. The evidence is a mass of affidavits of absent witnesses, some of them dead by their own hands or by the firing squad, only two of whom were produced (with devastating results) for cross-examination; of conclusions, rumor, hints and hearsay; of tendencious studies by Red Army General Staff deputy chiefs of department,

prepared for use in this trial; and of charges of aggression leading up to a war in which Japan was attacked. Analysis of this evidence to disclose contradictions, improbabilities and omissions could be protracted to great length, but is quite unnecessary at this stage; reference to some of its high points should suffice to present purposes.

The witness TAKEBE (affidavit, Exhibit 670), may be taken as typical of many who professed to say that Japan was plotting -- especially during the years 1940 to 1945 -- aggression against the Soviet Union. The purpose of occupying Manchuria, he says, was to build up a military base against the USSR; and he heard from Commander-in-Chief of the Kwantung Army UMEZU talk of the problem of preparing for war on the USSR. The purpose of the Kwantung Army, he was led to say, was "for attack against the USSR." But this whole structure collapses when the witness is permitted to explain that "the purpose of the Kwantung Army being stationed in Manchuria was for defence"; what now becomes of the whole elaborate theory of aggression? General USHIROKU, commander of an army group in the Kwantung Army, knew of no operations plans except defensive ones (Exhibit 703);

General KITA heard explanation from UMEZU in late 1941 of the war-time duties of his command, but was not told of any time for the opening of a war (Exhibit 835). Lieutenant-General KUSABA, who killed himself in Tokyo rather than face cross-examination, does not divulge how he knew that the 1941-1943 "offensive" operations plans were "decided by SUGIYAMA, TOJO and UMEZU" (Exhibit 838). (Just by the way, the two witnesses produced for cross-examination on this question both affirm that there was no operations plan vis-a-vis the Soviet Union for 1943. See the testimony of SEJIMA Ryuzo, and of MATSUMURA Tomokatsu.) Major MATSUMURA heard a rumor that the war against the USSR was to start in 1943, but doesn't say why it did not (Exhibit 833). Lieutenant-General TOMINAGA, who to date has been too sick in Siberia to attend for cross-examination, when Vice-Minister of War "drew an aggressive plan against the USSR in 1940" (Exhibit 705); but his meaning is clear from what follows. He "handed it over to the Commander-in-Chief of the Kwantung Army to put into practice," in April 1940; if it was put into practice, it was not aggressive, for no war ensued. The renegade Russian, Semyonov, put to death -- after making his affidavit --

for treason against his country, discoursed of two and a half decades and all the Orient; but he makes no mention of General UMEZU, confining his claims like the mercenary which he boasts of being only to having dealt with underlings (Exhibit 668).

The Kantokuen, Kwantung Army Special Maneuver, was much discussed. TAKEBE asked War Minister TOJO whether the strengthening of the Kwantung Army meant war, but got no answer (Exhibit 670); Lieutenant-General AKIKUSA interprets it as having "the purpose of taking military aggression against the Soviet Union by Japan" (Exhibit 743), but that is only his conclusion; he mentions no act of aggression. All the evidence shows that the Kantokuen was a precautionary reinforcement of the forces in Manchuria at a time when international relations were disturbed. White Russians were much in evidence, but no one of them is alleged ever to have fired a shot against his native country. There were spies, of course; there always are. Numerous documents purport to show that the Manchurian railroads and highways were greatly developed after the foundation of Manchoukuo (Exhibit 712), airfields (Exhibit 713), dumps (Exhibit 715), and barracks (Exhibit 716) were constructed and the borders

fortified (Exhibit 714), and that the seaports of the country exhibited much growth (Exhibit 718). All utterly consistent with TAKEBE's "the purpose of the Kwantung Army is for defence." We know from other evidence (the testimony of SEJIMA, that during 1942, at all events, the strength of the Kwantung Army was hardly more than half that of the Soviet Far Eastern Army; and from the summer of 1943 it was steadily depleted.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1045, a recess was taken until 1100, after which the proceedings were resumed as follows:)

fortified (Exhibit 714), and that the seaports of the country exhibited much growth (Exhibit 718). All utterly consistent with TAKEBE's "the purpose of the Kwantung Army is for defence." We know from other evidence (the testimony of SEJIMA, that during 1942, at all events, the strength of the Kwantung Army was hardly more than half that of the Soviet Far Eastern Army; and from the summer of 1943 it was steadily depleted.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1045, a recess was taken until 1100, after which the proceedings were resumed as follows:)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: The Japanese Army, it is charged, had plans for operations against the U. S. S. R. Also, in the eventuality of conflicts, for operations against the United States, Great Britain, the Philippines and perhaps other countries (the testimony of SEJIMA) As the President of the Tribunal noted, general staffs do prepare such plans; such is their function, to be prepared to defend their countries. These plans against Russia were annually drawn and discarded; they were drawn without the assistance of the Kwantung Army, to whom they were sent as its instructions; they contained within themselves no provisions for the commencement of operations, and the Commander-in-Chief of the Kwantung Army was prohibited from commencing operations pursuant to them; and none of them ever did take effect by the initiation of hostilities. The operations plans of the Kwantung Army were drawn by the general staff of that army, in accordance with the orders received from Tokyo (testimony of MATSUMURA). Finally, all such plans after the Nomonhan affair were defensive in nature; see the testimony of TAKEBE that "until the

Nomonhan Incident the Kwantung Army had taken an offensive stand towards the U. S. S. R., but after the above incident it changed to an attitude of aggressive defence" (Exhibit 670).

So far as concerns the time that this defendant was in Manchuria -- 1939-44 -- not only was there no aggression by Japan against the Soviet Union, but there is no credible evidence of any plans for such aggression. The whole record shows that all Japanese plans were defensive, and these counts should be dismissed for want of proof.

Pacific War

Participation in the Pacific War is charged against General UMEZU by these counts:

Counts 7 and 29, charging respectively the planning and preparing, and the waging, of war against the United States;

Counts 8 and 31, charging respectively the planning and preparing, and the waging, of war against the British Commonwealth of Nations;

Counts 9-12 and 15, charging respectively the planning and preparing of war against Australia, New Zealand, Canada, India and France;

Counts 13 and 30, charging respectively the planning and preparing, and the waging, of war against

the **Philippines**:

Counts 14 and 32, charging respectively the planning and preparing, and the waging, of war against the Netherlands;

Counts 16 and 34, charging respectively the planning and preparing, and the waging, of war against Thailand.

With the Pacific War General UMEZU is shown by the evidence to have had nothing to do prior to his becoming Chief of the General Staff in July 1944. From May 1938 to that date he was out of Japan -- commanding the 1st Army or the Kwantung Army -- and if war was planning he is now shown to have been called into council.

From July 1944, as Chief of the General Staff of the Japanese Army, he "waged" war beyond any question. This is perhaps not the appropriate time to argue at length the question of the responsibility of a professional soldier for practicing his profession of arms in a war in which he is summoned to participate. Suffice it for now to say, on this point, that in the absence of any evidence that he schemed for war, brought war about, desired war -- or even delighted in war -- it seems a shocking judgment which should condemn such a man for merely obeying the command of patriotism

and his oath.

Prisoners of War

The following counts relate to this point:

Count 44, charging all defendants with conspiracy to procure and permit the murder of prisoners of war;

Count 53, charing conspiracy to order and permit certain subordinates to commit breaches of the laws and customs of war;

Count 54, charging the ordering and permitting of breaches of the laws and customs of war;

Count 55, charging deliberate and reckless disregard of duty to ensure the observance of the laws and customs of war.

The conspiracy is, of course, not proved, but like all charges of conspiracy in the case is constructive at most.

The question of the responsibility of the General Staff, and its chief, for maltreatment of prisoners of war has fortunately been made clear by the testimony of TANAKA, Ryukichi. "In Japan the handling of prisoners is quite different from other countries, and the Prisoners-of-War Information Bureau and administration of prisoner-of-war matters were under the supervision of the War Minister himself."

In answer to the inquiry concerning the sort of matters handled by the War Minister, "....where to locate POW camps, how to handle prisoners of war, how to promote the health of prisoners of war, and other general treatment of prisoners of war; how to distribute Red Cross messages and parcels, and the question relating to the exchange of POW letters...". "Outside Japan" the policy is "handled by the Chief of the General Staff after consultation with the War Minister"; but: "it was carried out by the various commanders in the field in accordance with the orders and instructions of the War Minister", and "actually the matters were carried out by the commandants of the various prisoner-of-war camps in the field who communicated directly with the Chief of the Prisoners-of-War Information Bureau where the matters pertaining to POWs were disposed of". ". . . matters pertaining to prisoners of war were not connected in any way with operations, but being a policy matter, these matters could be handled directly with the Prisoners-of-War Information Bureau. . ."

Plainly the General Staff had no responsibility for control of prisoners, no voice in determining their treatment, and no opportunity to influence it.

I make the following insertion:

The considerations pointed out above apply with equal force to the prisoner-of-war question in Manchuria so far as General UMEZU, Commander-in-Chief of the Kwantung Army, is charged in connection with it, that the matter was not operational, but being administrative was disposed of by the War Ministry; hence, in the absence of proof of any personal knowledge or participation in atrocities, is not chargeable against the Army Commander.

The counts above enumerated, charging General UMEZU with responsibility for atrocities to prisoners of war, should be dismissed.

Miscellaneous

Various conspiracies are charged by the following counts:

Counts 1 and 4, charging conspiracy to bring about domination by Japan of Eastern Asia;

Count 5, charging conspiracy with Germany and Italy to bring about domination of the world.

The first point, conspiracy to dominate Eastern Asia, will be treated in the general motion to dismiss. Of the second, it will suffice to say that there is not a scintilla of evidence showing UMEZU as a conspirator with a German or an Italian.

It is possibly in connection with these counts

that the testimony of KAWABE Torashiro (exhibit 7676), Vice-Chief of the General Staff under General UMEZU at the end of the war, was offered -- "to prove," as the prosecution pointed out, "that the Commander of the General Staff permitted the destruction of all secret documents after the surrender." The point is trivial, perhaps -- especially in view of the cross-examination of KAWABE, who unequivocally states that the destruction of documents was not carried out by order or with knowledge of UMEZU, but was the responsibility wholly of subordinates -- but so is much of the evidence introduced with no apparent purpose other than simply mentioning this defendant's name.

THE PRESIDENT: Major Blakeney, there is no such exhibit as 7676. What is the correct number?

MR. BLAKENEY: I am sorry, sir. It appears that way in my copy, but I shall try to ascertain the correct number.

THE PRESIDENT: Anyhow, you have given us the page of the record.

MR. BLAKENEY: That is right, sir.

Thus, in the final phase, we find that the subdivision purporting to be "additional proof" against UMEZU consists of:

that the testimony of KAWABE Torashiro (exhibit 2,660), Vice-Chief of the General Staff under General UMEZU at the end of the war, was offered -- "to prove", as the prosecution pointed out, "that the Commander of the General Staff permitted the destruction of all secret documents after the surrender." The point is trivial, perhaps -- especially in view of the cross-examination of KAWABE, who unequivocally states that the destruction of documents was not carried out by order or with knowledge of UMEZU, but was the responsibility wholly of subordinates -- but so is much of the evidence introduced with no apparent purpose other than simply mentioning this defendant's name.

THE PRESIDENT: Major Blakeney, there is no such exhibit as 2260. What is the correct number?

MR. BLAKENEY: I am sorry, sir. It appears that way in my copy, but I shall try to ascertain the correct number.

THE PRESIDENT: Anyhow, you have given us the page of the record.

MR. BLAKENEY: That is right, sir.

Thus, in the final phase, we find that the subdivision purporting to be "additional proof" against UMEZU consists of:

The prosecutor's assertion that UMEZU, "in conjunction with General MINAMI", "engineered the taking over of North China and establishment of the North China Autonomous Government" -- an assertion already dealt with above. There was no evidence of conjoint action by UMEZU and MINAMI. Finally, the prosecution's assertion, the only one supported by any pretence of evidence, that UMEZU was "the leader of the military clique which was responsible for the failure of General UGAKI to form a new cabinet in January 1937." On this point the evidence consists of five documents: two (exhibits 2,208A and 2,208B) emanating from the Peace Section of the Home Ministry, and apparently introduced by inadvertence, as they have no connection with UMEZU or this case; a speech (exhibit 2,208C) by War Minister TERAUCHI explaining the reasons for his resignation; a talk (exhibit 2,208D) by Vice-Minister UMEZU, stating that the Army opposed General UGAKI but would take no measures to check the formation of a cabinet by him; and a "Notice to the Ex-soldiers' Organization" from UMEZU, explaining the Army's attitude toward General UGAKI, but not evidencing any plot or anything more than that the Army opposed him, which so far as appears is not a constituent of any crime being tried here. In

regard to the various snippets of documents showing disbursement of Army funds to or through General UMEZU (exhibit 2,209 is typical), we can only echo the wonderment of the President (ibid.), "What is the significance of this?"

Conclusion

It is most respectfully submitted that in no branch of the case does the evidence rise to the dignity of prima facie proof of guilt of the defendant UMEZU. There being no substantial evidence going to connect him with commission of any of the offences laid in the Indictment, it should be dismissed as against him.

THE PRESIDENT: Mr. Smith.

MR. SMITH: If your Honor please, I have the second part of the general motion to dismiss and also an argument which covers some of the major legal points raised in the motion. The second part of the general motion contains seventy-three paragraphs, and I would like to have your Honor indicate whether the motion itself should be read.

THE PRESIDENT: The general motion should be read so far as it is based on the state of the prosecution's evidence, so far as it raises new points of law which do not call for the proof of any facts, and so far as such point or points of law go to the whole of any count. We must remember we are dealing with motions to dismiss counts, and further, that we must avoid repetition of arguments, and still further, that the three members of the Court who were not parties to the motion as to jurisdiction in May last have read the record and know the points raised. We have not shut out a single argument which can be raised on the state of the evidence or on facts already established. The argument relating to the Chief Commander cannot be put at this stage because the necessary facts are not there. The matter that you mentioned about

the Chief Commander's powers under the United States constitution or legislation may be one entirely between him and the United States and may have no effect whatever as regards the other Allied Powers. That can be decided later, after we have heard argument on both sides.

Yes, Mr. Smith.

MR. SMITH Your Honor, the points that I have raised in the second part of the motion to dismiss I believe are well within the lines which your Honor delineated.

THE PRESIDENT: We accept your word for it, Mr. Smith, so you can proceed to read the general motion to that extent.

MR. SMITH: Could I also explain to your Honor that the question of the jurisdiction of the Court was in the first part of the motion and was deliberately separated from this part?

General Motion to Dismiss the Indictment on Behalf of all Defendants.

Now come all the defendants remaining in the above-entitled cause at the conclusion of the evidence on behalf of the prosecution and hereby jointly and severally move the Honorable The Internation Military Tribunal for the Far East

to dismiss the alleged indictment heretofore filed with the Tribunal on 3 May 1946 and each and every count thereof as it severally relates to and affects each of said defendants, upon the grounds hereinafter set forth.

For clarity of statement the grounds of the motion are divided into five categories, as follows: (1) General Grounds Common to all Defendants; (2) Crimes Against the Peace, Counts 1 to 36; (3) Murder, Counts 37 to 52; (4) Conventional War Crimes and Crimes Against Humanity, Counts 53 to 55; (5) Individual Counts.

General Grounds Common to all Defendants.

The points to be argued are --

THE PRESIDENT: Can you give us the argument without enumerating the points twice? I take it your general argument will refer to the points.

MR. SMITH: No, it does not, your Honor. It is going to be almost impossible to handle it that way. I mean, I was brought in at the last minute to draft this motion, and had there been some time it could have been handled in that way.

THE PRESIDENT: Other arguments on behalf of individual accused have been so framed, and I thought this one might be so framed, but apparently

it isn't. Proceed, Mr. Smith.

MR. SMITH: Your Honor, I explained in the argument that it would be impossible to discuss all of these points. We simply were going to argue the major points, but we relied on every point which is made in the motion, even though we didn't argue it.

THE PRESIDENT: We can take it that this is a motion on behalf of all the defendants? It says it is, but is there any contest about it? Apparently there is not, so proceed, Mr. Smith.

MR. SMITH: Well, your Honor, I didn't want to leave the Tribunal under a misapprehension. This motion is signed by Dr. UZAWA as Chief Defense Counsel, and at one time or another while the papers were being drawn, all the defendants in the case indicated, either in meeting or individually, that they joined in this motion.

THE PRESIDENT: Apparently they still join in it. There is no indication to the contrary, so proceed to put the motion.

MR. SMITH: Your Honor, I was cut off.

THE PRESIDENT: You understand why I am repeating this position, because of what occurred yesterday or the day before when Mr. Levin came to

the lectern. But apparently they are listening to me in silence. I may state we are assuming this motion is being put on behalf of all accused, and there is no contradiction.

Mr. Levin.

MR. SMITH: If your Honor please --

THE PRESIDENT: Mr. Levin.

MR. SMITH: If your Honor please, I hadn't completed my sentence when the light went on, and I would like to complete it before Mr. Levin is heard.

THE PRESIDENT: I have called on Mr. Levin.

MR. LEVIN: Mr. President, I should like to state that there has been no change in the position of the gentlemen whose names I indicated as not joining in this motion, and I should like to state further that Mr. Smith is in error in the statement to the effect that all defense counsel had joined in this motion at any time.

THE PRESIDENT: I would like each counsel who represents any accused who does not join in it to come to the lectern and say so.

MR. LEVIN: I take it, Mr. President,

there is no further necessity for me to indicate that I do not join in this motion on behalf of the clients I represent.

THE PRESIDENT: You might repeat whom you represent.

MR. LEVIN: I represent the accused KAYA and SUZUKI.

THE PRESIDENT: Dr. UZAWA.

DR. UZAWA: I have signed Mr. Smith's motion on behalf of Japanese counsel -- all Japanese counsel. That is in order to assure smooth progress in the proceedings I had desired to avoid any confusion.

THE PRESIDENT: Apparently you had no authority to do that.

DR. UZAWA: I think I have the authority to affix my signature.

THE PRESIDENT: You said you signed it for convenience sake and not because you were authorized by individual Japanese counsel.

DR. UZAWA: Mr. President, if you state that I have no authority to make my signature, then I shall reconsider my position or reconsider this matter.

THE PRESIDENT: Tell me, please, whether you were authorized by each Japanese counsel to sign that general motion.

DR. UZAWA: I believe that I have that authority.

THE PRESIDENT: I would like each Japanese counsel to come to the lectern and say whether or not you have it.

DR. UZAWA: I have been given the authority to defend all accused and their counsel by the

signature of all accused -- each and all accused -- and the signature of each and all defense counsel.

THE MONITOR: Slight correction: I have been given the power to represent all the accused, represent all the Japanese counsels, by signatures of all the defendants and all the counsels.

THE PRESIDENT: We will take that to be so until the contrary appears.

DR. UZAWA: Thank you.

THE PRESIDENT: Now, Mr. Smith, proceed to put the motion on behalf of all the accused because it appears that by their Japanese counsel they are parties.

MR. SMITH: Your Honor, in order to save time I was wondering whether this couldn't be copied into the transcript, that is, the points, and treated as though it had been read. Now, there is some duplication as far as the argument goes.

THE PRESIDENT: Read it into the transcript, Mr. Smith.

MR. SMITH: 1. There is no substantial evidence introduced by the prosecution tending to shown that any defendant individually or in concert, combination, confederation or conspiracy with any other defendant or with any other persons vaguely

described as "divers other persons" committed any alleged offense described in any of the fifty-five counts of the alleged indictment and in addition the evidence introduced does not amount to even a scintilla of proof and otherwise fails to demonstrate a prima facie showing in that respect.

2. There is not and never has been in existence any system or body of laws known as an international code, standard or criterion of criminal justice or an international code, standard or criterion of moral conduct carrying with it the right of criminal adjudication and criminal penalties, and the prosecution has wholly failed to show by evidence the existence of any such law or concept.

THE PRESIDENT: Those points have been put already. You need not repeat them.

MR. SMITH: Well, certainly all of the defendants in the case, your Honor, have not put that before. The only one I ever recall who put it was was Mr. HIROTA in one of his motions last May or June.

3. No system or body of law --

THE PRESIDENT: Mr. Smith, the motion will be part of the record and any of us who want to refer to it may do so without having to read it in the transcript. We want read into the transcript only new

points and new matter.

MR. SMITH: Well, in my view, your Honor, everything in here is new. Now, I don't know how I am going to cut it up to fit your Honor's point of view about the matter here.

THE PRESIDENT: Would it be correct to say that in this general motion you have included every point taken on behalf of any accused?

MR. SMITH: The answer is no, Your Honor, so far as I have ever heard.

THE PRESIDENT: Well, you could hardly take the points on behalf of the diplomatic section; they would not be particularly concerned. Or perhaps the points on behalf of the chiefs of staff and of the Navy. Would it be correct to say that you have taken every point of general application?

MR. SMITH: What I intended to do when I drafted this was to cover every general point common to every defendant in the case irrespective of his personal situation.

THE PRESIDENT: Well, you have raised no general point not already put on behalf of some or other of the accused. Is that so?

MR. SMITH: The answer to your Honor's question is no. There are some points raised here

that I never heard any counsel in the case mention before; I happened to think of them myself and put them in here.

THE PRESIDENT: As you read the motion slip over those that have already been put. If you will give us the numbers of the paragraphs we will know at a glance what has been omitted and we can refer to the motion itself if we wish.

MR. SMITH: Well, I don't know of any single paragraph which falls within what your Honor just stated about skipping paragraphs. However, I will skip on down to paragraph 5.

The defendants and each of them cannot be held to answer for offenses against alleged international criminal or moral standards which have been heretofore defined in such vague, general and indefinite terms, if at all, that no individual could be expected to know what such standard or criterion of conduct was and the criminal penalties attendant upon violation thereof; that such alleged standard or criterion has never been defined with the requisite certainty to support criminal intent; and further, that no international standard of criminal or moral conduct has heretofore been defined with the certainty that he who runs may read.

6. The alleged body or system of law which this tribunal undertakes to administer under the Amended Charter issued by General MacArthur on 26th April 1946 is entirely ex post facto in character and, hence, abhorrent to and contrary to the practice followed by all civilized nations since time immemorial.

7. The defendants with few exceptions are indicted for acts and possibly acts of omission committed while serving in the highest civil or military offices or both within the gift of the government of Japan. Their acts were the acts of the government of Japan acting in its sovereign capacity and the defendants and each of them are not answerable therefor under any body or system of law, national or international, known in the world. Their acts and omissions are beyond the reach of any body or system of law known to the world and are immune to re-examination by any sovereign nation or group of nations. It would have been impossible for any defendant to have committed the alleged offenses without wielding the power of his official office and consequently the defendants and each of them are indicted for alleged acts and omissions which arose entirely out of their official acts.

8. The alleged acts and possibly acts of

omission charged against the defendants and each of them were acts of the Japanese government acting in the sovereign capacity as a nation and none of the defendants is subject to prosecution as an individual by reason of having been an actor in the performance of his governmental functions.

THE PRESIDENT: Well, that has been put before and repeatedly put, individual responsibility -- the doctrine of respondeat superior.

MR. SMITH: Respondeat superior has nothing to do with what I am talking about here, your Honor. I am talking about the high sovereign immunity and not any ordinary relation of master and servant.

9. None of the fifty-five counts of the Indictment informs any defendant of the nature and cause of the accusation against him and each of said counts is drawn in such broad, general, indefinite and vague form as to amount to a mere dragnet and snare.

10. The law of conspiracy has no application whatever to official actions, compromise, consultation, and agreement between the highest officers of the government of Japan acting within the scope of their sovereign authorities for the reason that civilized government necessarily implies and requires cooperation toward the end sought by sovereign action

and heretofore criminal conspiracy has never been known to apply to any act or situation except positive acts inimical to the sovereign itself and defined and punished by domestic law.

11. No nation or individual can make a law of nations.

12. Neither the Potsdam Declaration nor the Japanese Instrument of Surrender generated or established any law, national or international, and the action taken on those occasions furnished no justification or support for the indictment herein.

13. In the light of the unusual character of this trial and the nebulous state of existing international law, even in its civil aspects, there can be no judicial notice of the "law" of this case; hence the law of this case must be proved by the proseeution as a fact and there being no proof in this respect, the Indictment fails in its entirety.

THE PRESIDENT: All those points were put in May, last, and subsequently by learned counsel. You are reading nothing new, Mr. Smith. We may have to confine you to a consideration on this general motion of the state of the evidence and that may be difficult, because after twenty-six accused have dealt with that there would seem to be nothing left

to be dealt with on a general motion.

MR. SMITH: If your Honor will just tell me what to do I will certainly appreciate it. The trouble is that I sometimes have to read a paragraph before I am conscious of the fact that some one counsel may have mentioned it somewhere.

THE PRESIDENT: Perhaps we will save time eventually if we adjourn now for luncheon to allow you opportunity to go through the motion, Mr. Smith.

We will adjourn until half past one.

(Whereupon, at 1155, a recess was taken until 1330, after which the proceedings were resumed as follows:)

AFTERNOON SESSION

The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Moore.

LANGUAGE ARBITER (Major Moore): Mr. President, if the Tribunal please, we present the following language correction:

Exhibit 1146, Record page 10,242, line 5, substitute, "for the government to open hostilities" for, "to declare war."

This correction was to have been made with corrections presented as found on Record page 11,139.

THE PRESIDENT: Mr. Smith.

MR. SMITH: If your Honor please, during the recess I have hurriedly gone through the remaining sections of this motion and I really find nothing that can be omitted and nothing which has been adequately covered by any other counsel in the case so far as my recollection goes.

THE PRESIDENT: Well, read on.

MR. SMITH: 14. The Peace Pact of Paris (Briand-Kellogg Pact), of 27 August 1928, was conditioned that, "Nothing in the new Treaty restrains or compromises

in any manner the right of self defense. Every nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self defense. Secondly, none of the provisions in the new Treaty is in opposition to the provisions of the Covenant of the League of Nations, nor with those of the Locarno Treaties or the Treaties of Neutrality. Moreover, any violation of the new Treaty by one of the contracting parties would automatically release the other parties from their obligations to the Treaty-breaking States." "Under these conditions" (M. Briand for France); "On this premise" (Signor Mussolini for Italy); and "In the light of the foregoing explanations" (Sir Austen Chamberlain for England), the chief signatory powers signed the Treaty. A similar representation and condition was made to the Empire of Japan which ratified the pact upon the condition set forth in a note of Mr. Kellogg, Secretary of State of the United States, dated 23 June 1928, which reads in part as follows:

"(1) Self-Defense. There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. (That

right is inherent in every sovereign State and is implicit in every treaty (Italicized) ). Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."

Consequently, Japan alone was competent to decide whether the circumstances confronting it required recourse to war in self defense and no international tribunal is competent to re-examine that question anew. Moreover, should a nation bona fide believe that war is required as a measure of self defense, it might be an aggressor in fact, but it is not a breaker of the Treaty -- recourse to war in self defense having been expressly excluded by prior agreement from the terms of the Pact, and the definition and circumstances of the exercise of self defense left to the exclusive judgment of each separate signatory power. Consequently, a breach of the foregoing Pact incurred no sanction other than moral disapproval.

THE PRESIDENT: Of course, the British and the American approach is to take the words of the agreement and give them their full effect. If they are clear there is no occasion to make any further

inquiry, but under no circumstances do you ask the opinion of the makers of the agreement. However, proceed to read what you have written, Mr. Smith.

MR. SMITH: 15. The "Convention for the Pacific Settlement of International Disputes," signed at the Hague, 18 October 1907, imposes no sanctions or penalties other than moral disapproval for violation of said Convention; and the Convention became obsolete and was superseded by the Briand-Kellogg Pact of 1928 as it specifically relates to the determination of what constitutes a war of self preservation and self defense. Many of the signatory nations thereto have in recent years resorted to war to settle disputes without any attempt to follow the prescribed procedures for Pacific settlement and no attempt has heretofore been made to punish or even censure those nations for breach of said Convention. The Convention has fallen into disuse and was obsolete long prior to 1928 by common consent and practice of nations. Since the evidence produced by the prosecution shows beyond doubt that the procedures of conciliation, mediation and arbitration would have been futile in the situation of Japan with respect to the disputes in Manchuria and China and that Japan substantially followed the procedures prescribed by said Convention in

its dealings with the United States and Great Britain in the negotiations preceding the commencement of the Pacific war, the Treaty has no application to the evidence in this case.

16. The Treaty of Versailles has no application to the activities of Japan in Manchuria in that all the evidence showed that Japan complied with the procedures prescribed by said Treaty up to the point of the decision by the League of Nations, a decision Japan was not bound to accept without regard to its merit and fairness and its inalienable right to act in self defense. The Treaty otherwise provided no punishment other than moral disapproval for any alleged violation thereof. All the substantial evidence introduced by the prosecution shows that the actions taken by Japan were in self defense, a matter outside the scope of the provisions of the Treaty of Versailles. Japan occupied a special, historical and incontrovertible position in Manchuria which it was entitled to defend. Otherwise the Treaty of Versailles was superseded by the Briand-Kellogg Pact of 1928 in situations relating to self preservation and self defense on the part of Japan.

17. The "Convention for the Pacific Settlement of International Disputes," signed at the Hague,

29 July 1899, is obsolete, was superseded by the "Convention for the Pacific Settlement of International Disputes" signed at the Hague, 18 October 1907, and both Conventions were superseded by the Briand-Kellogg Pact of 1928 in situations relating to self preservation and self defense which conditions Japan alone was competent to finally decide for itself. The Convention of 1899 is so vague, general and indefinite as to be without meaning in the context of this trial and provided for recourse to the procedures mentioned in the Convention "as far as circumstances allow." The prosecution has failed to show either the existence of the foregoing Treaty or its relevancy or application to the facts in this case.

18. The so-called "Nine-Power Treaty," signed at Washington, 6 February 1922, has no application to the evidence presented by the prosecution in this case for the reason that all the substantial evidence shows that the activities of Japan in Manchuria and China were acts in self defense; that there was no infringement of the territorial integrity of China in any permanent sense; and that otherwise there was no infringement of the so-called "open-door" in China -- whatever the loose term "open-door" might be taken to mean in view of the radically altered circumstances

and situation in China since 1922, particularly with respect to the hostile attitude of China itself in regard to said Treaty. The "Nine-Power Treaty" was superseded by the Briand-Kellogg Pact of 1928 in situations relating to the self defense of Japan and its citizens and Japan alone was competent to determine finally what facts and circumstances entitled it to act in self defense.

19. The assurance given by Japan, the United States, France and the British Empire to the Netherlands government on 4 February 1922 with respect to territorial integrity of insular dominions in the region of the Pacific Ocean has no possible application to this case for the reason that all the evidence shows that the Netherlands government declared war on Japan on 8 December 1941, which was long prior to the time that Japanese troops entered the Dutch East Indies. Moreover, on 8 December 1941 the Netherlands government and the Netherlands East Indies declared war against Japan "in view of Japan's aggression against two powers with whom the Netherlands maintain particularly close relations."

20. There is no substantial evidence that any defendant caused Japan to violate the Treaty of amity and respect for each other's territorial integrity

between Thailand and Japan, signed 12 June 1940. All the evidence introduced by the prosecution shows that Japanese armed forces entered Thailand territory with the consent and approval of the duly constituted Thailand government.

21. There is not even a scintilla of evidence tending to prove that any of the defendants violated the provisions of the Versailles Treaty or the agreement between Japan and the United States, signed at Washington, 11 February 1922, by fortifying the mandated islands of the Pacific at any time prior to the commencement of the Pacific war; nor any evidence that any defendant employed or permitted to be employed forced labor without compensation.

22. Japan never ratified the "Convention Relative to the Treatment of Prisoners of War," signed at Geneva, 27 July 1929, and is not bound by any provision of that Convention. The undertaking of Japan after the beginning of the Pacific war unilaterally to respect the provisions of that Convention "mutadis mutandis" meant nothing more or less than Japan recognized the spirit and principle involved in said Convention but did not follow the Convention in all its detailed requirements. The aforesaid Convention imposes no criminal sanctions against the heads of

government and those occupying high places in government. Nothing in the aforesaid Convention authorizes an international legal tribunal to sit in judgment upon alleged violations of the Convention or the spirit or principle embodied in the Convention; and otherwise the punishment of breaches of said Convention or the principle thereof by members of the armed forces or belligerents is left to the processes of the individual nation offended by such breach. Nothing in the provisions of said Convention establishes a so-called international code of criminal conduct relating to the treatment of prisoners of war punishable by an International Military Tribunal. These same considerations apply to the Convention for the treatment of civilian internees.

23. The Hague Convention of 1907 regarding the opening of hostilities has no application to situations involving a war of self-preservation and self-defense; it has no application because the very evidence of the prosecution shows that the United States, Great Britain and the Soviet Union were and had been engaged in a de facto state of war with Japan for several years prior to December 7, 1941, by reason of their substantial and continuous economic, financial and military assistance to China during the Sino-Japanese hostilities which had been in progress since July 7, 1937, and that by reason thereof the foregoing nations placed themselves in the status of belligerents against Japan; and further that the foregoing Convention has no application because all of the evidence of the prosecution shows that all nations represented before the Tribunal gave no heed to the provisions of said Convention, either with respect to intervention in the Sino-Japanese hostilities or in the negotiations immediately preceding the commencement of the Pacific war.

24. There is no substantial evidence to show that any defendant violated any of the treaties, conventions or assurances relied upon by the prosecution.

25. As the governments represented by the prosecutors before the Tribunal failed to respect and

abide by the provisions of the treaties, conventions and assurances set forth in the Indictment, the aforesaid governments are estopped in good conscience to bring into question in this proceeding acts and possibly acts of omission tending to show alleged violations of the same treaties, conventions and assurances.

26. All of the evidence introduced by the prosecution is as equally consistent with the hypothesis of innocence as it is with the hypothesis of guilt and, hence, there has been a palpable failure on the part of the prosecution even to make out a prima facie case with respect to any count in the Indictment.

CRIMES AGAINST PEACE

(Counts 1-36)

The Points to be Argued are:

27. The prosecution has failed to show by any substantial evidence that any defendant either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with persons in the vague category described as "divers other persons" ever planned, prepared or initiated a declared or undeclared war of aggression against any country or people. There has been no attempt on the part of the prosecution to trace any outline of a criminal conspiracy or to show any overt acts in

pursuance of an alleged conspiracy. No immediate connection is anywhere shown between acts of the defendants and results which transpired in the course of time; that is to say, the connection between isolated acts of the defendants and events which subsequently transpired in Manchuria, China and in the Pacific War are too remote to sustain the allegation of conspiracy. As none of the defendants had the final voice in any of the allegations contained in the Indictment, they cannot be held responsible for the final and ultimate decision which was put into action with respect to all matters mentioned in Counts 1-36 of the Indictment.

28. The prosecution has wholly failed to prove a war of aggression with respect to any of the Counts 1-36. There has not been the slightest effort on the part of the prosecution to prove the absence of any valid reason or justification for the activities of the armed forces of Japan in Manchuria, China, Indo-China and the countries involved in the Pacific war. On the other hand, with respect to Manchuria and China, all the prosecution evidence shows that the Chinese caused the hostilities and that the surrounding circumstances were such that Japan was forced to fight a war of self-defense. In any event, the evidence with

respect to Manchuria and China is so equivocal that it does not prove anything one way or the other with respect to alleged wars of aggression.

29. The prosecution has failed to offer any evidence to overcome the ordinary presumption that armed hostilities comprise legitimate self-defense.

30. There is a failure of proof to show that any defendant or defendants or "divers unknown persons" were acting in bad faith in their determination that Japan was entitled to engage in hostilities for the purposes of self-preservation and self-defense and in this respect the prosecution has failed to overcome the ordinary presumption of innocence.

MURDER

(Counts 37-52)

Points to be argued are:

31. There is a total failure of proof on the part of the prosecution that any defendant, either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with the alleged category of persons vaguely described as "divers other persons" ever "murdered" any of the inhabitants of the nations described in the foregoing counts. There is no international criminal law which defines the crime, standard or criterion, of "murder".

At common law, and by the domestic law of all civilized nations "murder" has been heretofore defined as the deliberate, purposeful and premeditated killing of a human being with malice aforethought. There has been a total failure of proof to show that any defendant or defendants ever murdered any human being. "Murder" by its very nature requires a showing of a close, immediate relationship between two human beings and involves all the elements of purpose, premeditation, "cooling time" and above all, the extremely personal element of malice aforethought. It has never heretofore been supposed that the heads of governments of sovereign nations are guilty of "murder" by reason of either legal or extra-legal activities on the part of the armed forces of a sovereign nation. Moreover, a killing by the armed forces of a sovereign nation has never been regarded as "murder", and, hence, there is nothing in international law to support the accusations against any of the defendants. There is a total failure by the prosecution to show that any defendant ordered, caused or permitted the Japanese armed forces to kill any human being in any of the countries designated in any of the foregoing counts. The prosecution has likewise failed to offer any evidence to overcome the ordinary presumption that a killing by a member of the armed

forces was a legal act during the continuation of hostilities.

CONVENTIONAL WAR CRIMES AND CRIMES AGAINST HUMANITY

(Counts 53-55)

32. There has been a total failure of proof on the part of the prosecution to show that any defendant, either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with "divers unknown persons" ever knowingly, intentionally or wilfully violated the rules, customs and usages of land or sea warfare or ever committed any act which might be construed to be an alleged conventional war crime or a crime against humanity. There is an entire failure of proof to show that any defendant had any personal connection with or knowledge of any individual activities on the part of the armed forces of Japan with respect to the treatment of prisoners of war and interned civilians or that any defendant was personally guilty of negligence in that respect. The assurances on the part of Japan that it would recognize the principle involved in the Geneva Convention in regard to the treatment of prisoners of war and civilians of 1929 "mutatis mutandis" left Japan almost unbridled judgment and discretion within the scope of common, ordinary

conceptions of humanity, to apply or not to apply the details of that Convention. The prosecution has failed to show by substantial evidence that any of the defendants were in the chain of command or in the line of responsibility which would fasten upon them or any of them legal or criminal responsibility for acts of commission and omission in the treatment of prisoners of war and interned civilians. Nothing in international law holds the high policy making officials of a sovereign nation, especially civilian officials, responsible for the activities of armies in the field. The prosecution has failed to introduce any evidence to overcome the ordinary presumption that the commanding officers of armies in the field have the final and ultimate responsibility for the treatment of prisoners of war and civilians coming into their custody during the existence of a state of war. Nothing in the practice of the past entitled an International Military Tribunal to sit in judgment upon averments of breach of the rules, customs and usages of land warfare; heretofore all such violations have been left to trial by the military tribunals of the nation which was offended by such breach of the rules, customs and usages of land warfare. Finally, all the evidence introduced by the prosecution dealing with alleged violations of such rules, customs and usages

necessarily have a definite geographical location and by reason thereof are not within the competence of an International Military Tribunal. Nothing in the Potsdam Declaration or the Japanese instrument of surrender undertook or purported to define so-called "war criminals" in other than the traditional sense or to enlarge the category of persons traditionally held to responsibility for such offenses.

Abram & Spratt

Now, your Honor, I come to individual counts and here I see an opportunity to avoid reading. You will notice throughout the discussion of the individual counts that it uniformly says that no defendant, individually or acting in concert with any other defendant, or with any divers unknown persons, ever did any of the things charged in each one of those counts.

I hope your Honors will read each one of these statements with respect to the individual counts, especially as I call attention to duplication of counts. For example, there are some counts in the Indictment which are identical except that one count charges all defendants and the other count charges only a part of them by name, and I will appreciate it if your Honor will allow the remainder of this motion dealing with the individual counts to be copies into the transcript and treated as though I had read it.

THE PRESIDENT: Well, we could do it, but we will have to consider seriously how far we will allow things to be read into the record which were not read. That is what it amounts to. We will have it before us as an exhibit -- we will have it before us as a part of the record, I should say.

MR. SMITH: Well, your Honor, I will go on and read it if it can't be handled in that way. I just don't want half of my motion appearing in the record and then have the record show that it abruptly dropped off. I am pressing this point.

THE PRESIDENT: You are speaking for all the accused. There are only about six pages, so go ahead.

MR. SMITH: (Reading): The Individual Counts. The points to be argued are:

(Count 1) 33. There is no substantial evidence tending to prove that any two or more defendants ever engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein."

(Count 2) 34. There is no substantial evidence tending to show that any two or more defendants engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of the Provinces of Liaoning, Kirin, Heilungking and Jehol, being parts of the Republic of China."

(Count 3) 35. There is no substantial evidence tending to prove that any two or more defendants engaged in a common plan or conspiracy to "secure

the military, naval, political and economic domination of the Republic of China, either directly or by establishing a separate State or States under the control of Japan."

(Count 4) 36. There is no substantial evidence tending to show that any two or more defendants engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein." This count appears to be a mere duplication of Count 1, supra.

(Count 5) 37. There is no substantial evidence tending to prove that any two or more defendants engaged in a common plan or concpiracy that "Germany, Italy and Japan should secure the military, naval, political and economic domination of the whole world." All the evidence of the prosecution tends to prove the reverse of the foregoing allegation.

(Count 6) 38. There is no substantial evidence tending to show that any two or more defendants "Planned and prepared a war of aggression and a war in violation of international law, etc. against the Republic of China." This count appears to be a mere

duplication of Counts 1, 2, 3 and 4.

(Count 7) 39. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression and a war in violation of international law, etc. against the United States. The evidence of the prosecution clearly shows that the United States acting in concert with other great Powers applied economic embargoes and sanctions against Japan to the point of strangulation, indulged in military encirclement of Japan and otherwise forced Japan into the position of fighting a war of self preservation and self defense. There is a total failure of proof that Japan engaged in a war of aggression against the United States.

(Count 8) 40. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against the United Kingdom of Great Britain and Northern Ireland and all parts of the British Commonwealth of Nations. All the evidence of the prosecution shows beyond doubt that the United Kingdom itself declared war on Japan and had previously threatened Japan that the United Kingdom would go to war "tihin the hour" of the beginning of hostilities between the

United States and Japan.

(Count 9) 41. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against the Commonwealth of Australia. All the evidence shows that Australia itself declared war on Japan long prior to the time that hostilities reached the territory of Australia.

THE PRESIDENT: You could add the same thing in respect to New Zealand and Canada and India.

MR. SMITH: (Continuing to read):

(Count 10) 42. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against New Zealand. All the evidence shows beyond doubt that New Zealand declared war on Japan.

(Count 11) 43. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against Canada. All of the evidence shows beyond doubt that Canada declared war on Japan.

(Count 12) 44. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against India. All of the evidence shows beyond doubt that India

declared war on Japan in line with the policy of the United Kingdom.

(Count 13) 45. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Commonwealth of the Philippines. As the Philippines had not attained its independence at any time during the continuance of the Pacific war and was subject to the sovereign jurisdiction of the United States and its inhabitants were nationals thereof, this count appears to be a mere duplication of Count 7 which avers a planned and prepared war of aggression against the United States of America.

(Count 14) 46. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Kingdom of the Netherlands. All the evidence shows beyond doubt that the Netherlands itself declared war upon Japan.

(Count 15) 47. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Republic of France. All of the evidence in the case shows that there was no war of aggression against France and that the landing of troops in Indo-China

was pursuant to a voluntary agreement between the Vichy French Government and Japan, the Vichy Government having exercised both de jure and de facto authority over Indo-China after the capitulation of France.

(Count 16) 48. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against Thailand. There is a total failure of proof in this respect. All the evidence shows beyond doubt that the entry of Japanese troops into Thailand after the commencement of the Pacific war was pursuant to a voluntary agreement with the Thailand Government. Moreover, the Kingdom of Thailand is not a party to the prosecution and nowhere does it appear by what authority the existing prosecutors undertake to carry on a prosecution without the consent of the Kingdom of Thailand.

(Count 17) 49. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Union of Soviet Socialist Republics. All the evidence in the case demonstrates beyond doubt that Japan never entertained the slightest intention of attacking the Soviet Union and that Japan for many

years had been genuinely disturbed by Soviet aggressiveness, large preparations for war and desire to fasten its communistic philosophy upon Japan and China, as well as other nations throughout the world.

(Count 18) 50. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Republic of China. All the evidence of the prosecution shows that China caused the hostilities against Japan and that China had otherwise been engaged for many years in hostile actions against Japanese citizens, anti-Japanese propaganda and boycotts, and had otherwise been engaged in a long period of civil war and internal chaos which threatened the lives and property of Japanese citizens.

(Count 19) 51. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Republic of China. This count appears to be a mere duplication of Count 18 with the exception that several additional defendants are named in this count. No reason appears why the Indictment was split in this respect.

(Count 20) 52. There is no substantial evidence tending to show that any two or more of the

named defendants initiated a war of aggression against the United States of America. This count is a duplication of Count 7, with the exception that Count 7 names all defendants, whereas the instant count names only fifteen defendants.

(Count 21)

53. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Commonwealth of the Philippines. This count appears to be a duplication of Counts 4, 5, 7 and 13.

(Count 22)

54. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the British Commonwealth of Nations. This count appears to be a duplication of Counts 4, 5, 8, 9, 10, 11 and 12. As previously pointed out, the British Commonwealth of Nations themselves declared war on Japan.

(Count 23)

55. There is no substantial evidence tending to show that any two or more defendants initiated a war of aggression against France. This count appears to be a mere duplication of Counts 4, 5, and 15.

(Count 24)

56. There is no substantial evidence tending to prove that any two or more named

defendants initiated a war of aggression against the Kingdom of Thailand.

(Count 25)

57. There is a total failure of proof that any two or more of the named defendants initiated a war of aggression against the Union of Soviet Socialist Republics. There is no evidence in the record to show that any such war transpired.

(Count 26)

58. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Mongolian People's Republic. The Mongolian Republic is not a complainant before the Tribunal or represented among the prosecutors. Nowhere does it appear that the Mongolian People's Republic has given its consent to a complaint before the Tribunal and otherwise it does not appear by what authority the instant prosecutors present a case on behalf of such Republic.

(Count 27)

59. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against China. This count appears to be a duplication of Counts 1, 3, 4,

5, 18 and 19.

(Count 28)

60. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Republic of China. This count appears to be an exact duplication of Count 27 and all the previous counts identified under Count 27.

(Count 29)

61. There is no substantial evidence tending to prove that any two or more defendants waged a war of aggression against the United States. This count appears to be an exact duplication of Count 20, except that Count 20 names only part of the defendants.

(Count 30)

62. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Commonwealth of the Philippines. This count appears to be an exact duplication of Count 21 except that Count 21 names less than all the defendants.

(Count 31)

63. There is no substantial evidence that any two or more defendants waged a war of

aggression against the British Commonwealth of Nations. This count appears to be a mere duplication of Count 22.

(Count 32)

64. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Kingdom of the Netherlands. This count appears to be a mere duplication of Counts 1, 4 and 5.

(Count 33)

65. There is no substantial evidence tending to show that any two or more of the named defendants waged a war of aggression against the Republic of France. This count appears to be a duplication of Counts 1, 4 and 23.

(Count 34)

66. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Kingdom of Thailand. This count appears to be a mere duplication of Counts 1, 4 and 24.

(Count 35)

67. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Union of

Soviet Socialist Republics.

(Count 36)

68. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Mongolian People's Republic and the Union of Soviet Socialist Republics. Moreover, no authority appears for the representation of the Mongolian People's Republics in the complaint before the Tribunal.

(Count 37)

69. There is no substantial evidence tending to show that any two or more of the named defendants made a common plan or conspiracy to unlawfully kill and murder inhabitants of the named countries; nor any evidence tending to show the personal responsibility of any defendant for the death of any such persons.

(Count 38)

70. There is no substantial evidence tending to show that any two or more named defendants made a common plan or conspiracy to "murder" any persons within the designated territories.

(Counts 39-43)

71. There is no substantial evidence

tending to show that any two or more defendants made a common plan or conspiracy to effect the "murder" on a wholesale scale of prisoners of war, members of the armed forces of countries opposed to Japan who might lay down their arms, and civilians or crews of ships destroyed by Japanese forces.

(Counts 45-52)

73. There is no substantial evidence tending to show that any two or more defendants ordered, caused or permitted the armed forces of Japan to slaughter the inhabitants of the city of Nanking, the City of Canton, the City of Hankow, the city of Changsha, the city of Hongyang, the cities of Kweilin and Liuchow, or to unlawfully "murder" certain members of the armed forces of Mongolia and the Union of Soviet Socialist Republics. There has been a total failure of proof to show the personal responsibility of any defendant for the death of any of the foregoing inhabitants of said territories as alleged.

(Counts 53-55)

74. There is no substantial evidence tending to show that any two or more of the named defendants ever made a common plan or conspiracy

to commit conventional war crimes and crimes against humanity as alleged in the foregoing counts or to commit breaches of the laws, customs and usages of war in any of the named territories. There is not a scintilla of evidence in the case to show that any individual defendant personally committed any of the acts and omissions alleged in said counts. The responsibility for the commission of any such acts lay with the immediate military commanders of Japan in the field and by the Geneva Convention for the treatment of prisoners of war and internees of 1929, and by immemorial practice the responsibility for such acts was always fastened upon the individual guilty of the particular act or omission in question and the immediate, active commander of such offender in the field of operation. Furthermore, such violations were not subject to trial before an international military tribunal and were solely and exclusively punished under the domestic processes of the nation offended by such offense if and when the offender came under the power of such offended nation; and the indictment in the instant case cannot be sustained in those respects because all such alleged offenses necessarily have

a definite geographical location.

Now, your Honor, I have an argument which I would like to make on some of the major points. They are arguments in support of general motion to dismiss on behalf of all defendants.

THE PRESIDENT: Will there be any repetition? We are obliged to hear you, but not to allow you to repeat yourself.

MR. SMITH: Necessarily, your Honor, there is a duplication to the extent that I have mentioned some of the points and then taken them up for argument.

THE PRESIDENT: Well, go ahead with your argument, Mr. Smith; but we do trust you to behave reasonably to avoid repetition, which we are not bound to tolerate.

MR. SMITH: The argument will not attempt to cover each of the points made in the seventy-three paragraphs of the motion to dismiss. However, even though it has not been possible to argue each point, counsel wish to make it plain that the defendants and each of them rely on every point made in said motion to dismiss. The argument has been necessarily limited to a brief outline argument of some of the major points

because of the pressure of time, lack of personnel and other matters.

1. Upon a careful examination of the treaties and conventions relied upon by the prosecution, as well as other treaties and conventions not mentioned by them, and the opinions of jurists and text-writers, counsel have been unable to discover the existence of any system or body of law which provides an international penal code, or an international standard or criterion of criminal justice, or an international standard or criterion of moral conduct which carries with it or supports the right of criminal adjudication and criminal penalties.

THE PRESIDENT: That point has been heard and reheard, and you have pages devoted to it. We are not going to hear any more on that point at this stage.

MR. SMITH: Well, your Honors, that is merely an opening to the argument. That is simply stating the basic fact in connection with this rather extended argument as to whether there is any law --

THE PRESIDENT: The framing of the argument in different terms does not make it a new

argument. As regards the Kellogg Pact, you have quoted word for word what you have said already. As far as I can discover from a hasty perusal of this document now before us, there is nothing new.

MR. SMITH: Well, your Honor, I would like to tender this written argument for filing and let the record show what I sought to argue before your Honors and ask your Honors to allow me an exception.

THE PRESIDENT: It is already a part of the record, and you can have an exception, whatever that means.

Where are the prosecution?

Mr. Williams.

MR. E. WILLIAMS: Mr. President, Members of the Tribunal:

To answer the motions to dismiss made by the several defendants by treating each motion separately would involve a lengthy and in our judgment, unnecessary repetition. For that reason it is our purpose to make one series of arguments which will answer collectively all points presented by the motions of all defendants and each point made by the motion of each defendant.

It is well to bear in mind something of the structure and contents of the Indictment which may be summarized as follows:

Counts 1 to 5 charge that the defendants entered into unlawful conspiracies having as their object the domination by unlawful aggression in violation of treaties etc. (1) All of East Asia, Pacific and Indian Oceans, against any country or countries which might oppose that purpose; (2) that part of the Republic of China commonly known as Manchuria; (3) all of the Republic of China; (4) all of East Asia and of the Pacific and Indian Oceans etc. against the United States, British Commonwealth, France, Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union; and

(5) a conspiracy between the defendants and Germany and Italy to secure military, naval, economic and political domination of the whole world against any country or countries which might oppose such purpose, and particularly the United States, British Commonwealth, France, Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union.

Counts 6 to 17 inclusive, allege that all of the defendants planned and prepared the wars of aggression and in violation of international law, treaties, agreements, etc. against various nations separately named in each count, and including in addition to the nations engaged in this prosecution, the Kingdom of Thailand.

All of the defendants are named in each of the 17 counts above enumerated.

Counts 18 to 26, inclusive, allege that certain of the defendants initiated wars of aggression and in violation of international law, treaties, etc., against China, United States, Philippines, British Commonwealth, France, Thailand, Soviet Union and the Mongolian Peoples Republic.

Counts 27 to 36, inclusive, charge the defendants with waging wars of aggression and in violation of international law, treaties, etc.

All of these counts except 33, 35 and 36, name all of the defendants. Count 33 alleging the waging of war against France, Count 35 alleging the waging of war against the Soviet Union, and Count 36 alleging the waging of war against the Mongolian Peoples Republic and the Soviet Union, do not include certain defendants.

Counts 37 and 38 allege that certain defendants therein named conspired together to murder any and all such persons, both military and civilian, as might be present at the place attacked in the course of initiating of unlawful hostilities against the United States, the Philippines, British Commonwealth, Netherlands and Thailand.

Counts 39 to 43, inclusive, include specific murders at specified places, including Pearl Harbor, Kota Bahru, Hongkong, and the attack on H.M.S. PETROL at Shanghai, and at Davao in the Philippines, in which many persons were murdered.

Count 44 alleges that all of the defendants participated in a conspiracy for the murder of prisoners of war and civilians on land and at sea.

Counts 45 to 50, inclusive, allege specific acts of murder against defendants named in said counts, at various places in the Republic of China.

Counts 51 and 52 allege that certain named defendants murdered members of the armed forces of the Mongolian and Soviet Republics.

Count 53 alleges that certain named defendants conspired to commit breaches of the law and customs of war in respect of the treatment of prisoners of war and civilian internees.

Count 54 alleges that certain named defendants ordered, authorized and permitted such offenses.

Count 55 alleges that certain named defendants deliberately and recklessly disregarded their legal duty to take adequate steps to prevent such breaches and thereby violated the laws of war.

In this analysis no effort has been made to name the particular defendants charged in specific counts which include any less than all of the defendants. The reason for this will appear from a consideration of the theory and procedure followed by the prosecution in establishing its case.

The prosecution has presented its case in accordance with the well recognized "Conspiracy" method of proof. That is to say, it has proceeded to prove that an overall conspiracy of a comprehensive character, and of a continuing nature, was formed, existed and operated during the period from 1928 to 1945 covered by the Indictment, and that the object and purpose of said conspiracy consisted in the complete domination by Japan of all of the territories generally known as Greater East Asia described in the Indictment; that it was the purpose to secure such domination by war and wars of aggression and in violation of international law,

treaties, etc., at whatever places and against whatever nations and persons should be convenient or necessary to accomplish the overall purpose of the conspiracy.

It followed, of course, as an incident, and as a necessary part of such conspiracy, that in pursuing the object of the conspiracy, and in the planning, initiating and waging of wars of aggression, and wars in violation of international law, treaties, etc., that numerous individuals, both military and civilian, would be killed.

The killing by a belligerent who has planned, initiated, or is waging an unlawful war, constitutes murder.

It, therefore, follows from fundamental, universal principles of the law of Conspiracy, that any and all persons who were members of the overall conspiracy which I have just described, became individually and severally criminally responsible and liable to prosecution and conviction for each and every act committed in the course of the conspiracy, whether that act be the unlawful planning, initiation, or waging of war, or whether it be a murder or other atrocity in violation of law committed in the course of the carrying out of the

conspiracy.

In view of the adoption of this method of proof, it becomes unnecessary to do more than to examine into and determine two questions:

FIRST: Has a general and continuing conspiracy of the character and scope set forth in Count 1 of the Indictment been established?

SECONDLY: As to any particular defendant, was he a member of the conspiracy at the time the specific crime set forth in any count, (other than a conspiracy count), was committed?

If these two questions are answered in the affirmative, it follows that any defendant who was a member of the conspiracy at the time any specific act charged as a crime was committed, is guilty of that crime, whether he personally participated therein or not. "Who does through another, he does it himself."

It is perhaps an unnecessary precaution, in view of the wide learning and experience of the Members of this Tribunal, for me to do so; but, as indicating the prosecution theory in presentation of this case, and the legal basis therefor, I take the liberty of quoting an approved instruction given to the jury in the California case of People v. Sacramento

Butchers' Association, 12 Cal. App. 471, at P. 495, which is as follows:

MR. BROOKS: If the Tribunal please, we would like to object to the introduction of statutory law, as the prosecutor has put forth here at the bottom of page 7 which is based wholly upon statutory law, and the introduction of cases based upon such statutory law before an International Military Tribunal of this kind on conspiracy.

THE PRESIDENT: Criminal conspiracy in the law of my country and, I believe, in the law of all British countries and of America is not based upon statute but is the development of the common law; and we may be very much helped by decisions and directions to juries by eminent American judges. Certainly, we will disregard any American decision which was based and based alone on American statute.

MR. E. WILLIAMS: Shall I proceed?

THE PRESIDENT: Proceed, yes.

We will recess now for fifteen minutes.

(Whereupon, at 1445, a recess was taken until 1500, after which the proceedings were resumed as follows:)

member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators."

I also quote from the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Allen vs. The United States, 4 Fed. (2) 688 as follows:

"A conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a

member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators."

I also quote from the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Allen vs. The United States, 4 Fed. (2) 688 as follows:

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party thereto."

Another case which indicates the prosecution theory of proof is the case of People v. Walker, 17 Cal. App. (2) 372, which was a case in which the defendant was convicted of the crime of grand theft, a specific offense. Proof was made by showing that he was a member of a conspiracy in the course of which the theft was committed. The defendant claimed that he was not responsible because while the theft had admittedly been committed, it had been committed by another person.

The court, in disposing of this contention, stated as follows:

"On the trial of the action it was neither asserted nor attempted to be proved by the prosecution that defendant either directly participated in the actual commission of the offense for the commission of which he was being prosecuted, or even that he was personally present at the time when and the place where the crime was actually committed. To the contrary, defendant's conviction depended upon legal proof of his membership in the conspiracy, or of his having been a party to an agreement to commit the crime.

"Appellant concedes the fact that on the

occasion in question the crime of grand theft was committed.

"Apparently without conflicting authority with reference thereto, as a matter of common knowledge, the law recognizes the fact that where two or more persons have engaged in the commission of some criminal act, their antecedent agreement or common understanding, one with the other or the others, so to do, ordinarily has been entered into in secret; but manifestly, where the crime is shown to have been committed by two or more individuals who in its commission have acted in concert, one with the other or the others, it is an inevitable conclusion that the crime was the result of an agreement of conspiracy between or among the participants therein that the crime should be committed."

Having in mind the theory of the prosecution, as above expressed and the legal principles set forth in the cases just quoted, we have proceeded to prove the existence of the conspiracies alleged, and the membership in the conspiracy, of each and all of the defendants.

I purpose now, very briefly, to point out a sufficient amount of the evidence produced over these many months of trial, to show that such a

conspiracy as described in the Indictment has been proved to have existed, and to point out to the Court the evidence which shows the object, purpose and scope of this conspiracy.

When I have completed this presentation, I believe it will appear to the satisfaction of the Court that the answer to the First Question, namely:

"Has a conspiracy been proved?"

must be answered in the affirmative.

Following this presentation, my brother, Mr. Comyns-Carr, Prosecutor for the United Kingdom, will point out to the Court so much of the evidence in respect of the activity of each of the defendants as is sufficient to show that that defendant was at the times involved in the various counts, a member of the conspiracy and therefore liable for the commission of the crimes specifically set forth.

We feel that this presentation will adequately answer all contentions made by the defense, and that in addition thereto, it will serve to point out and clarify the issues and will be of some assistance to the Court in passing upon such questions of admissibility as may arise in the course of the presentation of the defense.

As seen from the quotations just read, the cardinal requirement on the prosecution in a conspiracy case is to prove the common design. In some cases the common design is difficult to find while in other cases it is comparatively easy. However, in either case, once the common design has been established, all the evidence, regardless of how disconnected it may seem to be, or regardless of how disconnected the actions of the various defendants may seem, falls easily into its proper and logical sequence.

In this case, it is submitted, it is not at all difficult to locate and spell out the common design. Aside from the evidence on Class B and C Offences, almost each and every document and the testimony of each and every witness highlights the common design as being nothing less than to obtain political, military and economic domination of what has come to be known as the Greater East Asiatic Area by and through any and all methods whatsoever including the fighting of aggressive wars. If one grasps this common design as the key string of the mosaic of the evidence, one must inevitably recognize that between the years 1928 and 1945 a conspiracy among certain of the militaristic class

of Japan and certain civilians was formed and put into operation. The prosecution, of course, is unable to name all of the members of that conspiracy. We do know, and the evidence has established, that even prior to 1928 and continuously on down to the end of the conspiracy the defendant OKAWA was engaged in promoting, publicizing and inciting the people of Japan to join in a militaristic and ultra-nationalistic "renovation" of Japan for the purpose of bringing about the subjugation and domination by the Japanese Empire of all of East Asia and the Islands of the Pacific and Indian Oceans and the ousting of all the whites from that territory. The purpose was to start by taking Manchuria, then the rest of China, then (dependent as to order upon current conditions) to move northward and take Siberia, and to move southward and to take Malaya, Thailand, French Indo-China, the Netherland Indies, Burma and India, the Philippines, Australia and New Zealand. The grandiose object of the conspiracy is adequately expressed in exhibit 2182A.

This exhibit, taken from the book, "The Establishment of Order in Greater East Asia", by OKAWA, was published 20 August 1943 during the course of the conspiracy and was an expression by one of

the conspirators of its object and purpose. I quote as follows:

"If I were to write a modern history of Japan, I should begin it with a description of Shin-en SATO's ideas. This is because in the soul of this great scholar had already been conceived a new Japan in the most concrete form. (From page 9)

"Shin-en SATO, first of all, thought Japan 'the foundation of the world' and believed that Japan would be able to make all the rest of the world her countries or prefectures if she succeeded in 'ruling over the foundation of the world'. With a view to carrying out this 'great work of renovating the world', he advocated a drastic political renovation of the interior Japan and the order of unifying all nations. 'In order to develop other countries, it is best for the Empire /i.e. Japan/ to make a start by absorbing China into her first of all,' he advocated '....Even the powerful China is no match for the Empire, not to speak of other barbarous countries.... If China becomes our possession, is it possible for the other countries in the East, Siam and India not to come gradually under the sway of the Empire yearning for her power of

commanding love and respect, being overawed and falling prostrate before her?' Besides, it was his opinion that in order to control China, 'no other place is easier to occupy than Manchuria.' And at the same time he thought it necessary to obtain the whole ''area in the South Sea covering thousands of ri starting with the Philippines so as to prepare for the northward aggression of the European Powers, especially of Great Britain and then obtain gradual control of India and its neighbors and various islands in the Indian Ocean, following the occupation of China, Annam, Shan-Cheng and Cambodia.' (From pages 10-11)."

The conspirators, for the purpose of trying to bring about the dominance of a military class in Japan, planned the so-called March and October Incidents, as well as other incidents, and planned an occurrence at Mukden on September 18, 1931 which made an excuse for the KWANTUNG ARMY, poised in preparation for such an event, to sweep over Manchuria and effect its military conquest.

Something of the course of the conspirators' plans is shown in the book written by the accused HASHIMOTO (published in 1936 during the course of the conspiracy), in which he states that in 1930 while

returning to Japan from Turkey:

"During my thirty days' voyage I pondered on how to reform Japan, and as a result I succeeded in drawing a definite plan to a certain degree. And on returning to the General Staff Office, my former haunt, I devised several schemes in order to put my ideas into execution. Although I dare not say it was the only cause of such results, however, the Manchurian Incident, secession from the League of Nations, and renunciation of the Disarmament Treaty, took place successively and within the country, May 15 Incident, Shinpei Tai Incident, and the February 26 Incident took place in succession."

The evidence shows clearly that the defendants OKAWA, HASHIMOTO, DOHIHARA and ITAGAKI and others were members of this conspiracy and that they helped bring about the incident which was intended to, and did, lead to the military aggressions in Manchuria beginning September 18, 1931. See:

Testimony of OKADA; testimony of TANAKA.

I may say, if the Court please, I have the citations in the left-hand column of the prepared matter. I am not reading them.

The testimony of OKAWA at his trial in

Tokyo in 1934 (during the existence of the conspiracy) showed the relation of the March and October Incidents to the Manchurian Incident and the aggressions in Manchuria. He stated that he (OKAWA) and the accused HASHIMOTO, ITAGAKI and DOHIHARA were all in the conspiracy.

OKAWA's defense in the Tokyo Court of Appeals sets forth some of his activities in the conspiracy to set off the Manchurian aggressions, and in particular his close cooperation with the KWANTUNG ARMY in selecting Japanese "officials" for Manchuria.

The purpose of the Manchurian Incident was to seize Manchuria by military aggression, to reform it politically as a part of the Japanese Empire, and to consolidate and integrate its economy and finance with that of Japan so that its raw and manufactured materials and labor might be used as a supply and its soil as a base for further aggressions.

That the high military command of Japan and, in particular, the KWANTUNG ARMY were involved in this conspiracy to seize and dominate Manchuria is shown by the fact that within twenty-four hours of the Incident at Mukden large Japanese armies were spreading out over Manchuria. Such immediate action (in view of our knowledge of logistics) must have been preceded by many weeks or months of preparation. This is also indicated by General MINAMI's strong militaristic speech at a conference of Division Commanders concerning Manchuria and

Mongolia August 4, 1931.

That the Mukden Incident was a planned one is shown not only by the evidence concerning the plot to which reference has already been made, but is also strongly indicated by the written report of the League of Nations Committees, the testimony of the witness John B. Powell, the reports of Consul General HAYASHI to Foreign Minister SHIDEHARA, and the testimony of the witness MORISHIMA.

All of the evidence concerning what the Japanese did in ruling the territory, politics, and economy of Manchuria, together with the circumstances of the establishment of the puppet governments in Manchuria (the latter designed to deceive the other powers), shows that it was at all times the intent of the Japanese conspirators to take permanent physical, political and economic possession of Manchuria, and that this was to be accomplished, and in fact was accomplished, by means of aggressive warfare, in violation of international law and treaties and assurances and, in particular, in violation of the Nine-Power Treaty and the Kellogg-Briand Pact.

At the time of the Mukden Incident the accused MINAMI was War Minister. He claimed to know

nothing of the activities of the Kwantung Army and the troops from Korea who were spreading over Manchuria. He claimed he could not control them. It is significant, however, that no action to control the supply of morey, material or reinforcements to those armies was undertaken by MINAMI. He was shortly followed as War Minister by the accused ARAKI who actively supported the additions to and reinforcements of the Japanese Armies fighting in Manchuria. ARAKI was engaged in propaganda, seeking to whip up the militaristic spirit of the Japanese, to glorify the Japanese Army, to point out its goal in conquering all of East Asia, to point out the probability of war with the United States, and by means of flags and airplanes to show that Japan could conquer and dominate the whole world. This was done by means of a motion picture entitled "Japan in Time of Emergency" which was made and distributed in 1933.

During the period from 1932 to 1936 Japan completed its conquest of Manchuria (including Jehol Province); expanded its Governmental, economic and industrial control for that territory and prepared for the next step which was further Armed

advance into China.

With Korea and the Provinces of Manchuria and Jehol as bases for operations, Japan was in a position to prosecute her plans against the Soviet Union to the north or against the remainder of China to the south. If she elected to proceed first against the Soviet Union, a hostile China more and more united under the strong leadership of Chiang Kai-shek was a threat from the rear, and if she elected to proceed first against China there was danger of unified opposition by China and Russia.

In this dilemma, the accused or their leaders sought the political strength and bargaining power which would be acquired by military alliance with Germany, a nation then engaged in a program of military preparedness for aggressive action in Europe. The result was the conclusion of the Anti-Comintern Pact on 25 September 1936. The Pact on its face was directed against the activities of the Communist International, but it was converted into a military alliance aimed at the U.S.S.R. by an accessory protocol and secret agreement. The Anti-Comintern Pact was designed and intended, through the threat of joint military action between Japan and Germany,

to operate as a check against the Soviet Union, to strengthen the hand of Japan in China and to afford an excuse for continued Japanese military aggression.

Japan, thus fortified in her international situation, was in a position where she could proceed in comparative safety with the execution of her so-called divine mission of renovating the world, the first step of which was the creation of a New Order in East Asia. The accused or their leaders, by the conclusion of this Pact, laid the groundwork for further cooperation of aggressive nations in the accomplishment of the objects of the conspiracy.

On July 7, 1937, occurred the so-called "Marco Polo Bridge Incident." From that time on aggressive warfare against the rest of China continued with the Japanese gaining month by month and year by year additional territory throughout the balance of the period of the conspiracy. The aggressions of the Japanese Army during this period may best be stated in the language of the witness Goette as follows:

"The military aim of the Japanese Army as reiterated to me by such Japanese officers was not

so much the acquisition of territory as the annihilation, submission, and killing of Chinese Nationalist Armies."

This view is verified by one of the accused, HIRANUMA, who, in his speech before the Diet on 21 January 1939, when as Prime Minister he stated:

"In regard to the China affair upon which both the Government and the people are concentrating their endeavors there exists an immutable policy, for which ample sanction was obtained by the previous Cabinet, and in accordance with which necessary steps have been taken in various directions. As the present Cabinet is, of course, committed to the same policy, it is determined to proceed at all costs to the achievement of the final purpose."***

I skip something and end with this:

"I hope the above intention of Japan will be understood correctly by the Chinese so that they may cooperate with us without the slightest apprehension. Otherwise the construction of the new order would be impossible. As for those who fail to understand to the end and persist even hereafter in their opposition against Japan, we have no alternative than to exterminate them."

It may be stated in passing that as indicated by ARAKI's speech in the motion picture above referred to, the "extermination" of those who stand in the way or who do not understand the high spiritual purpose of Japan's military aggressions is called "self-defense."

As the Japanese armies fought the Chinese in an "Incident" which lasted from September 1931 to September 1945, and which included from 1937 to 1945 a total casualty list of Chinese soldiers in excess of three million as well as uncounted numbers of civilians killed, wounded and rendered homeless, the Government of Japan undertook to take over the Government, the soil, the economy and the industry of each part of China as it was conquered.

The railways were taken over and put under the joint control of the Kwantung Army and the South Manchurian Railway Company.

At the same time the economy of China was being integrated with that of Japan in accordance with the policy expressed by the accused HOSHINO, in which he envisaged the development of the resources of Manchuria, China and all East Asia for the benefit of Japan (which lacked necessary resources).

Through the organization and operation of

the China Affairs Board, the North China Development Company, Ltd., and Central China Promotion, Ltd; through tremendous investment in Chinese industry; through the setting up of puppet governments in Peiping and Nanking; through the obtaining of special rights and privileges under secret agreements in contravention of the Nine Power Treaty, Japan took possession of all of the resources of such parts of China as she conquered.

At the same time she proceeded to embarrass and humiliate the Governments of the United States and England and to kill and destroy the property of nationals of those and other European countries.

It was Japan's policy not only to establish her "new order" in East Asia, but to drive out Anglo-Americans from China. In 1935 the accused MATSUI, in a conversation with General Ching,"advocated that Asia should be the Asia of the Asiatics and that European and American influences should not be expanded."

In 1940 the accused HASHIMOTO wrote:

"The moment we establish a policy to drive out all Anglo-Americans from China, China will begin to move toward a new order."

In 1941 the accused MATSUOKA said:

"*** The work of the establishment of Manchukuo is the first step of the reconstruction of the new order in East Asia, and at the same time was a herald of the construction of the world new order and its position in the world history should be said to be very important. The true significance of the Manchurian Incident will be realized for the first time when the construction of the new order in East Asia will be accomplished for which we are now making every endeavor."

Whalen & Morse

In 1944 the accused KOISO in an address before the Diet stated:

"The real intention of Japan lies in the expulsion of Anglo-American influence, the emancipation of China by those countries which has continued for one hundred years and the construction of a Greater East Asia based upon morality and a mutual cooperation."

A prominent Chinese, General Ching, correctly interpreted Japan's intentions by stating:

"I was afraid that what he (MATSUI) meant by Asia of the Asiatics was actually the Asia of the Japanese."

The League of Nations report of 8 October 1937 concludes:

"After examination of the facts laid before it, the Committee is bound to take the view that the military operations carried on by Japan against China by land, sea and air are out of all proportion to the incident that occasioned the conflict; that such action cannot possibly facilitate or promote the friendly cooperation between the two nations that the Japanese statesmen have affirmed to be the aim of their policy; that it can be justified neither on the basis of existing legal instruments nor on that of the right of self-defense, and that it is in

contravention of Japan's obligations under the Nine Power Treaty of February 6, 1922, and under the Pact of Paris of August 27th, 1928."

Sometimes the conspirators have spoken pleasingly of their desire to stabilize East Asia and to bring peace to troubled peoples.

The all-pervading vice of this contention is that Japan in her aggressions in Manchuria and the rest of China undertook to decide in Japan (and without consulting China) what territory belonging to China she would occupy and how, what form of government should exist and by whom it shall be organized, what industrial, commercial and financial systems should be established, how transportation, communications, press, radio, propaganda, censorship, customs and foreign relations should be controlled and conducted. Yet, neither by custom, International law, treaty, precedent nor otherwise were any of these matters in the slightest or most remote degree the business of Japan. She had no more right to arrogate to herself powers such as these in China than China had to do so in Japan. Her acts were those of a lawless, aggressive invader and conqueror. They were in violation of Chinese sovereignty and of Japan's solemn obligations to China and the other signatories

of the Nine Power Pact and other treaties.

These acts were the result of the plotting and planning of these conspirators and a part of the overall plan for the conquest of "Greater East Asia."

Military operations in 1937 and 1938 proved that Japan was engaged in a major war against China. Although Germany protested against Japan's aggression in China under the guise of fighting communism in third states, the accused who were directing and influencing the course of Japanese aggression in East Asia, by the early part of 1938 had won the unreserved support of Germany in her plans against China as well as against the Soviet Union.

Germany was promised preferential trade treatment in China in consideration of the special relations which existed between Japan and Germany after the conclusion of the Anti-Comintern Pact. The controversy which arose out of the division of spoils in China afford a high degree of proof of the Japanese plan of subjugation and exploitation by aggressive warfare.

Japan and Germany embarked upon extensive programs of preparation for military operations and demonstrated similar intentions to wage aggressive warfare in their respective spheres of the world. Japan, acting through and under the influence of the accused,

and Germany conceived the idea of strengthening their respective international positions by inducing other nations to unite in close association with them. This plan first took shape in the form of recruiting Italy as a member of the Anti-Comintern Pact on 6 November 1937, and was followed by the admission of Manchukuo and Hungary to the Pact on 22 February 1939 and Spain on 27 March 1939. The Pact was renewed on 25 November 1941, at which time Bulgaria, Denmark, Finland, Croatia, Rumania, Slovakia and the puppet Nanking regime, under the name of "National Chinese Government," were admitted by declarations of adherence. The next move was to obtain closer cooperation between the people of the Axis Powers by resorting to the device of concluding so-called cultural treaties.

Although the accused, acting through their leaders, mobilized the entire strength of the nation for its war against China and won many naval and military victories, they were unable to conclude the so-called China Incident. Consequently, they were brought to the realization of the necessity for closer collaboration of Germany, as demonstrated by the future course of negotiations. In the words of OSHIMA, the accused wanted a military alliance with Germany

"which would help to conclude the China Incident and (1) to clarify the Russian situation so that troops could be deployed elsewhere, (2) to strengthen Japan's international position, and (3) to receive technilogical and economic aid from Germany."

A division of opinion developed in the Japanese government as to the extent to which Japan should be committed to participation in a German war against England, France and the United States. In April 1939 the conclusion was reached that a limited interpretation of the Pact was necessary from Japan's standpoint for the reason that Japan "was at the moment not yet in a position to come forward openly as the opposer of the three democracies." Negotiations continued intil the conclusion of a non-aggression treaty between Germany and the Soviet Union, the reaction from which caused the downfall of the Japanese Cabinet.

The expediency of quickly concluding the German-Russian non-aggression pace became apparent upon the dramatic German invasion of Poland on 1 September 1939. Notwithstanding the temporary setback to the conclusion of a Japanese-German-Italian military alliance, efforts were continued by the accused to develop closer Japanese-German relations

with the view to ultimate conclusion of a tri-partite military alliance.

As the day of world conflagration approached the conduct and declarations of the accused, or their leaders, revealed more and more the common plan for the accomplishment of the so-called divine mission which they were preparing to impose upon East Asia and the world by resorting to aggressive warfare to the extent necessary for the accomplishment of their objectives.

In the southern areas French Indo-China occupied a strategic position of the highest importance over which Japanese control was necessary for any contemplated military operations against Malay, Singapore and the Netherlands East Indies and the Philippines. In addition, Indo-China was rich in natural resources vitally needed by the Japanese economy for the continuance of war. OSHIMA, timing his action with Hitler's initiation of war against Poland, advised military aggression in the southern areas of Greater East Asia and against Hong Kong, for which he declared the Japanese navy was prepared.

Within two days after the German invasion of Belgium, Luxembourg, and the Netherlands on 9 May 1940, and within two days after the fall of France on

17 June 1940, the accused asked German assurances of a free hand in the Netherlands East Indies and French Indo-China. This was followed by a Japanese ultimatum to French Indo-China relative to transportation of materials to Chiang Kai-shek. At the same time negotiations were renewed with Germany for the conclusion of the military alliance. So strong was the demand for conclusion of a military alliance that a joint conference of the Japanese Army, Navy and Foreign Office officials was held on 12 July 1940 for the purpose of intensifying efforts to procure such a pact. In this conference it was determined that "it is our object to realize the expansive purpose of the Japanese Empire and strengthen our international position by embodying an ultimate cooperative connection between our Empire, which is establishing a 'New Order' in East Asia, and Germany, which is fighting for a 'New Order' in Europe.

A unified policy based on the opinions of the Army and Navy was adopted in which it was determined that the area to be embraced within the "New Order in the Far East" should extend from Burma and the eastern part of India to New Zealand; that the fundamental principle of the coalition should be cooperation within the respective spheres intended to be established

by the Axis Powers; that the Japanese conception of "political leadership" was considered to be "occupation" of the areas in question; and that necessity existed for immediate execution of their plans.

The YONAI Cabinet was considered too weak to carry out the foreign policy, so the accused forced its resignation and such men as KONOYE, MATSUOKA, TOJO, HIRANUMA, OHASHI, OSHIMA, and SHIRATORI were put in responsible government positions. Thus the stage was set for the enactment of the final scene in carrying out that part of the conspiracy which was designed to secure Axis help in accomplishing the objects thereof.

At a Four-Minister conference on 4 September 1940 it was determined that the time was ripe for speedy initiation of conversations for strengthening of collaboration among Japan, Germany and Italy. The basic principles for such conversations were declared to be the making of a fundamental agreement for mutual cooperation "by all possible means," which included "recourse to armed forces."

On 27 September 1940 the Tri-Partite Pact between Japan, Germany and Italy was concluded with unprecedented speed. By its provisions the Axis Powers attempted to apportion the world by establishing areas in which the leadership of the respective powers was

recognized. Each pledged full cooperation in the establishment of leadership within the sphere of the others, and political, economic and military aid was pledged in the event of an attack against any one of the signatories by a nation not then involved in the European war or in the war with China. Letters were secretly exchanged providing for consultation among the signatories for the purpose of determining whether action or a chain of actions would constitute an attack within the meaning of the Pact. This Pact in its essence contained the ultimate development of the plot of the aggressive powers directed toward the division of the world and the establishment of the so-called New Order, which had for its purpose the extinguishment of democracy throughout the world and the subjugation of all the nations by the aggressive states. It was the culmination of years of effort on the part of the accused or their leaders to form a military alliance in which the participating powers would by solemn agreement recognize Japan's so-called divine mission and agree to link their fate in the accomplishment of its objectives. Without this coalition the accused could not have risked the fate of the Japanese Empire in initiating the final phases of their plan to establish a New Order in East Asia

and the South Seas. In the atmosphere of the Privy Council meetings held prior to the conclusion of the Pact and in the light of the declarations made by the accused and their co-conspirators in such meetings, there is no room left for doubt that the accused or their leaders had planned aggressive warfare and were seeking the political and military aid that such a treaty would afford.

Almost immediately after the conclusion of the Pact a rapprochement with Russia was suggested as a prerequisite for a Japanese advance in the regions south of China. The accused, or their leaders, seized the opportunity to mediate in the Indo-China-Thailand border dispute as a device by which both Powers could be placed under obligation to the Japanese Government. In the spirit of the Tri-Partite Pact, Germany extended valuable and effective aid in coercing Indo-China to its submission to Japanese demands.

Close collaboration continued between the Axis Powers until the attack against American and British possessions on 7 December 1941. Foreign Minister MATSUOKA and Ambassador OSHIMA in conferences with Hitler, Ribbentrop, Goering and Funk discussed plans for an attack on Singapore, the coordination of operations in the Pacific with operations in Europe, the exchange of technical information, and information derived from military operations in the field, and cooperation required by the Axis Powers in all spheres after the completion of the war. General commissions and commissions of a technical character, one military and one economic, were formed under the provisions of the Tri-Partite Pact in order to effectuate full collaboration among the Axis Powers.

Acting in full collaboration with their Axis partners, the accused unified the Japanese Government and nation behind the Tri-Partite Pact, and by their declarations and conduct put into motion forces designed to accomplish the objects of the conspiracy. On 18 November 1941, Germany was asked if she would consider herself at war with the United States if Japan initiated the attack and whether Germany would enter into an agreement not to conclude separately peace or an armistice in case of war with the United States, and

Germany, without hesitation and in accord with the spirit of the Tri-Partite Pact, replied favorably to both inquiries. On 28 November 1941, Ribbentrop declared, "There never has been and probably never will be a time when closer cooperation under the Tri-Partite Pact is so important." He also stated, "Should Japan become engaged in a war against the United States, Germany of course would join the war immediately." Italy made the same commitments.

The efforts of the accused to obtain Axis assistance in the executions of their plans bore fruit. The Pearl Harbor attack occurred. Japan, Germany and Italy concluded a "No Separate Peace Pact" on 11 December 1941 to remain in force during the life of the Tri-Partite Pact. In this treaty the three Powers also agreed after the termination of the war to "cooperate most closely for the purpose of realizing a righteous new order in the meaning of the Tri-Partite Pact." "A military agreement in the spirit of the Tri-Partite Pact" was concluded by the three Powers on 18 January 1942 by which the world was divided into zones for military operations.

The conduct and declarations of the accused and their co-conspirators relating to the negotiations for the Anti-Comintern Pact, the various trade and collateral

agreements, the Tri-Partite Pact, the No Separate Peace Pact, and the Military Operational Agreement between the Axis Powers and collaboration under the same, we submit, constitute indubitable proof of the existence of the conspiracy charged.

In so far as the conspiracy included plans to prepare for, initiate and wage wars of aggression against the Soviet Union, ample evidence has been offered to show that at all times included in this case it was the intention of the conspirators to attack Russia and to seize and permanently hold parts of her territory lying in East Asia (particularly Siberia.) The only differences which existed among the conspirators were as to when this should be done -- whether the advance should first be north or south. It has already been shown that the decision was to go south. This did not involve any abandonment of the plans to attack Russia -- it merely delayed their execution.

Throughout the period of the conspiracy many things were done in the planning of the aggressions against Russia. Within the limits of this presentation it is not possible or even desirable to make an exhaustive analysis of the evidence. It is sufficient to state that the evidence clearly shows that in the course of this conspiracy the following things were done:

During the period of 1928-1945 propaganda for war of aggression against the Soviet Union was spread.

The seizure of Manchuria and turning it into a military base for an attack either on the Soviet Union or China in violation of the Portsmouth Treaty and the Peking Convention of 1925.

The establishment of a military base for an attack on the USSR in Korea in violation of the Portsmouth Treaty and the Peking Convention.

The preparation of the population of Manchuria for war against the USSR, including the formation of the "Kyo-wa-kai" Society. Subverisve activities of the Japanese military and the employment of White Russian emigrants against the USSR in violation of the Peking Convention.

Sabotage activities of the Japanese on the Chinese Eastern Railroad.

Systematic violations of the state frontier of the USSR.

An undeclared war of aggression against the USSR in the Lake Khassan area during July and August of 1938.

An undeclared war of aggression against the USSR and the Mongolian Peoples Republic in the Nomongham area in May-September 1939.

Refusal to accept Russia's proposal to conclude a non-aggression pact as a manifestation of hostile aggressive policy of Japan against the USSR.

The conclusion of the Anti-Comintern Pact.

The conclusion of the Tri-Partite Pact.

As the day drew near for the offensive which she believed would remove the last obstacles from the path of her conquest and control of Greater East Asia, Japan's preparations for war mounted to huge proportions, entailing a complete reorganization and greater control and centralization of her entire industrial, economic and financial structure and the closer integration of her political and economic systems with those of Manchuria and China. These preparations included overall mobilization of all of Japan's manpower.

In carrying out her plans Japan, in 1933, withdrew from the League of Nations; in 1934 she gave notice of her withdrawal from the Washington Naval Treaty; she withdrew from the 1936 Naval Conference; she refused to adhere to the Fourteen-Gun Limitation which had been agreed to by Britain, France and the United States.

Military and naval plans not only required the mobilization, training and arming of vastly inclreased numbers of soldiers and sailors, acquisition of war ships, carriers, aircraft, tanks, artillery and the

countless impedimenta of modern war, but demanded the accumulation of vast stores of material and long range plans for the acquisition of replacements as these were used.

The Mandated Islands were fortified and otherwise prepared for tactical and strategic use in war. This was in direct violation of the mandate and of Japan's treaty obligations with the United States.

The proposed wars being of an aggressive character, involving the invasion of other countries, military currency to be used in such other countries in denominations of dollars, pesos and guilders was ordered printed and held for use.

The true scope of the grand design of the conspirators to achieve political, military and economic control of the Asiatic continent and adjacent areas was fully developed in the evidence presented during the phase which covered the relations of Japan with the United States and Great Britain during the period of the Indictment.

This evidence showed that apart from the resistance of the Chinese and other peoples of Asia, these two powerful nations were the great and formidable obstacles to the successful achievement of all that the conspirators planned. They were obstacles not only because of the

vast financial and economic interests which they or their nationals possessed in China and the rest of Asia, which had to be expelled or limited and subordinated to those of Japan if the conspiratorial plan was to be successful, but also because through solemn treaty and agreement Japan stood firmly bound with them to forego the aims and ends of the conspiracy and to forbear from any and all of the actions required to effectuate it.

The evidence has shown that so long as the provisions of the various treaties remained in full force, so long as the parties signatory to them felt themselves firmly bound to respect them both in letter and in spirit, the conspiracy to dominate the East Asiatic and Pacific worlds could not be fully carried out. The object of the conspiracy could be successfully accomplished only if the formidable obstacles of the United States and Great Britain could be removed, and this could be accomplished only if these treaty provisions and their co-relative duties and obligations could be evaded, abrogated, altered, redefined, or broken.

The evidence in this phase of the case from the period from 1931 on told the story of the efforts of the conspirators to rid Japan of the duty of carrying out the various obligations which they had voluntarily undertaken of respecting the rights of others

in the Asiatic-Pacific world and of the resistance of the United States and Great Britain to such efforts. To free Japan of her duties and obligations under these treaties so as to eliminate Britain and the United States from the Asiatic world or to subordinate their rights there to those of Japan within the limits allowed by Japan, the evidence shows that the conspirators resorted to every known or conceivable method to evade, alter, abrogate or redefine the treaties.

They used intimidation, fraud, artifice and chicanery, subtle redefinition of terminology, negotiation, and when all else failed they resorted to the use of armed force in an aggressive war against these two western powers.

The evidence showed that by the beginning of the year 1941 the situation had reached a critical stage and at this juncture the conspirators decided to finally accomplish their purpose of dominating the Asiatic-Pacific world and remove the obstacles to that project presented by Great Britain and the United States. To accomplish this they adopted a two-fold policy; on the one hand they negotiated with Britain and the United States on certain specific outstanding problems in accordance with certain proposals which, if accepted, would have left Japan the master of the Asiatic-Pacific

world, with Britain and the United States relegated to whatever position Japan might allow; on the other hand they actively prepared for war with these countries with the same objectives and results. Both programs had the same objectives, and while some felt that they could accomplish the objectives of the conspiracy through negotiation, others viewed them as impossible from the beginning and regarded them only as useful camouflage for active war preparations, to lull the United States and Britain into a false feeling of security. To this latter group the negotiations were an integral part of the preparation for war.

Perhaps we who are Americans or British are inclined to regard the sudden and unprovoked attacks on Pearl Harbor, Kotabahru, Hong Kong, and Davao as the culmination of this conspiracy. This is not true. The attacks on Britain and the United States were but steps in the grand design to become the masters of all East Asia. This was the true objective - the end and purpose of every act of the conspirators at home and abroad.

THE PRESIDENT: We will adjourn now until half past nine tomorrow morning.

("hereupon, at 1600, an adjournment was taken until Thursday, 30 January 1947, at 0930)

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